

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

MARIE J. FONTANA,

Plaintiff,

vs.

PHILIP MORRIS INCORPORATED,
("PHILIP MORRIS U.S.A."), R.J.
REYNOLDS TOBACCO COMPANY,
LORILLARD TOBACCO CO., and BROWN
& WILLIAMSON TOBACCO CORP.,
Individually and as Successor to the
AMERICAN TOBACCO COMPANY,

Defendants.

CASE NO. 00-01731 CA01

TRIAL

Volume 22

TRANSCRIPT OF PROCEEDINGS

in the above-styled cause before the Honorable Thomas S. Wilson, Jr., Circuit Judge, at the Dade County Courthouse, 73 W. Flagler Street, Miami, Florida, on Monday, April 2, 2001, at 1:30 p.m.

Miami, Florida

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I N D E X

ROLAND INGRAM, M.D.

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1 (THEREUPON, the following proceedings were held:)

2 THE COURT: Anything new since we broke?

3 MR. REILLY: New rebuttal witnesses have
4 been identified. Mr. Weinstein's son. We'll
5 have a discussion about that one, too.

6 MR. WEINSTEIN: The boss here decided to
7 list my son as a witness; the lead counsel, I
8 guess we call it.

9 MR. HUNTER: You can call me the boss.

10 THE COURT: So we're ready to rock and
11 roll, then, right?

12 Okay. Why don't you have the good doctor
13 come on in.

14 (The witness entered the courtroom.)

15 (The jury entered the courtroom.)

16 THE COURT: Good afternoon, ladies and
17 gentlemen. I hope everybody had a good lunch
18 and are ready to proceed.

19 Let the record reflect all our jurors are
20 present and accounted for.

21 Mr. Reilly.

22 MR. REILLY: Thank you, Your Honor.

23 Good afternoon, everybody.

24 THE JURORS: Good afternoon.

25 CONTINUED DIRECT EXAMINATION

1 biggest breath you can take from a
2 emptying as far as you can, was 1.7,
3 predicted to be 3.5 liters, less than h

4 Q. Next one up.

5 A. But the -- that's the FVC. Right
6 Yes.

7 And the FEV1/FVC ratio is 88
8 the predicted is 78 percent. So there
9 obstruction. There's just small lung
10 vital capacity, but she gets it out ve
11 quicker -- more quicker than normal

12 Q. Doctor, I haven't shown you all o
13 pulmonary function tests performed on
14 today?

15 A. No.

16 Q. You've looked at them in the pas

17 A. Yes.

18 Q. And looking at them as did you at
19 at these today, do they uniformly show
20 lung disease?

21 A. Yes, they do.

22 Q. Do they uniformly not show an o
23 lung disease?

24 A. There is never any obstruction

25 Q. If a physiologist, not a medical do

1 OF ROLAND INGRAM, M.D.

2 BY MR. REILLY:

3 Q. Doctor, I think we left off discussing
4 pulmonary function tests, and at the risk of doing
5 one too many, I'm going to ask Pete if he would put
6 up the pulmonary function test results from
7 6/12/2000. This was at Jackson Memorial Hospital,
8 the same -- you've got the -- that's the flow
9 volume. Thanks.

10 Now, that is very hard to see, so you're
11 going to have to refer to the one you have with you
12 there.

13 And, Doctor, can you tell us, and I'll do
14 this very briefly, can you tell us whether or not
15 this pulmonary function test indicates a restrictive
16 or an obstructive disease process going on in
17 Ms. Fontana?

18 A. Restrictive.

19 Q. And can you tell this jury what values you
20 look at in this pulmonary function test to make that
21 determination?

22 A. Well, there are three things. The total
23 lung capacity is less than 50 percent of normal: 2
24 and a half liters, as opposed to a predicted 5.5.
25 That's restrictive. The vital capacity, that's the

1 like you, but if a physiologist has come
2 this jury and indicated that he sees evid
3 least in part, an obstructive lung disease
4 based on his interpretations of these pul
5 function tests, is he correct?

6 A. I disagree with him.

7 Q. Is there any value anywhere in the
8 or in the flow volume charts, that suppo
9 of an obstructive characteristic to or featu
10 Ms. Fontana's lung disease?

11 A. No.

12 Q. Doctor, I'm going to take you quic
13 the Jackson Memorial Hospital CT and o
14 films of June 2000. This a chest film; i
15 correct?

16 A. Yes.

17 Q. And you've seen this before, corre

18 A. I have.

19 Q. And very briefly, can you tell this
20 what it is you see on this CT -- I'm sorry
21 this chest film?

22 A. Yes. Well, you see the shadow
23 middle. That's where the heart is. O
24 of it, as always, there are these extra s
25 are the lymph glands, near the eye of

1 There's also some shadowing down here at the bases
2 of the lung, near the diaphragm, that looks like
3 interstitial lung disease.

4 But the most important thing is the
5 scarring in the upper lung fields with retraction of
6 the eye of the lung, up high, and you see a little
7 ball right there with a little air above it. That
8 is a fungus ball, and that's the little crescent
9 sign above it. And there's also a suggestion of a
10 fungus ball here, in the midst of these cystic
11 cavities.

12 So, this is pretty typical for Stage IV
13 sarcoid, complicated by fungus balls.

14 Q. Any evidence of emphysema, chronic
15 bronchitis, peribronchial thickening, COPD?

16 A. Not that I see.

17 Q. Let me see the CT films.

18 Doctor, you looked at these CT films from
19 the same time frame?

20 A. Yes, I did.

21 Q. And, briefly, do they show the same thing?

22 A. They do. You can see the fungus ball up
23 here with a little air crescent above it. And the
24 one on the other side, the right side, again, a
25 fungus ball with an air crescent. You see that very

1 well.

2 Q. What's the disease process going on in
3 Ms. Fontana?

4 A. It's sarcoid, with a fungus ball in the
5 cyst that the sarcoid caused.

6 Q. Any indication on the CT film of COPD,
7 chronic bronchitis, peribronchial thickening or
8 emphysema?

9 A. Not that I can detect, no.

10 Q. Can we see the interpretation?

11 This is the interpretation by Dr. Joel
12 Fishman, the radiologist at Jackson Memorial
13 Hospital, correct?

14 A. Yes, it is.

15 Q. All right. And the interpretation
16 indicates what the condition of the patient is; is
17 that correct?

18 A. Yes, it does.

19 Q. In other words, why they're doing the CT
20 and why they're doing the chest films?

21 A. It does.

22 Q. And does it indicate any lung disease
23 process other than sarcoidosis going on in this
24 lady's lungs?

25 A. No, it does not.

1 Q. All right. Are his findings all
2 consistent with your findings?

3 A. They are.

4 Q. And are they all consistent with
5 sarcoidosis?

6 A. They are.

7 Q. Does Dr. Fishman make any mention of any
8 condition consistent with COPD, emphysema, chronic
9 bronchitis or peribronchial thickening?

10 A. No.

11 Q. Doctor, I'm going to take you in a little
12 different direction for a moment.

13 Could you bring out Dr. Coopersmith's
14 office note of 4/20/95?

15 Doctor, I've highlighted a portion of
16 Dr. Coopersmith's office note for the first visit he
17 ever had with Ms. Fontana. And it indicates that
18 she's been a flight attendant for 22 years. The
19 patient was placed on steroids due to the fact that
20 she has become progressively more short of breath
21 with exertion.

22 Would you explain to the jury what that is
23 about?

24 A. Yes. The small lungs certainly cut down
25 on the ease with which you could exchange air with

1 your environment, but the other thing that we talked
2 about, the time it takes for oxygen to get into the
3 blood -- exercise shortens the time of those cells
4 in the blood vessels that go by the alveoli, so
5 exercise lowers oxygen.

6 And at altitude, the air is thinner, and
7 that makes it worse; that is to say, thinner air has
8 a lower partial pressure of oxygen to affect gas
9 exchange. So two things, exercise and high
10 altitude. Since cabins are only pressurized,
11 depending on the altitude, to about 8,000 feet or
12 so --

13 Q. This note says that she -- she especially
14 notices that if she is in the smoking section. Do
15 you have an opinion as to what the smoking section
16 has to do with it, if anything?

17 A. Yes. Well, I think you'd be far more
18 aware of your breathing in the smoking section. It
19 doesn't smell very good.

20 Q. Does the environmental tobacco smoke she
21 would have been experiencing on the flight have any
22 impact on her sarcoidosis?

23 A. Oh, not on the sarcoidosis at all, no.

24 Q. Let's go to the 10/1/95 -- let me see if
25 I -- yes.

1 This is another office note of
2 Dr. Coopersmith about six months later, right?
3 A. Yes.

4 Q. All right. This one says she gets
5 somewhat more short of breath when she flies to
6 Denver, or the plane reaches 44,000 feet.

7 Is that the same process going on?
8 A. Yes.

9 Q. Now, the flight to Denver in 1995 has no
10 smoking on it, but she still experiences the same
11 shortness of breath, correct?

12 A. That's what that says, yes.

13 Q. All right. And what's the explanation for
14 that?

15 A. Well, it relates very closely to what we
16 talked about before, that at high altitude, the air
17 gets thinner, so that the pressure of oxygen is
18 smaller, and, therefore, you cannot transfer gas
19 into the blood very easily at high altitude.

20 Denver is a mile-high city and the cabin
21 may be pressurized to 10,000 feet when it's flying
22 at 44,000 feet. So that's the same thin air
23 explanation for difficulty in putting oxygen into
24 the blood.

25 Q. Let me take you to one more office note of

1 oftentimes radiologists and pulmonologists
2 chronic bronchitis or emphysema on an
3 it's so common that they don't even men
4 you experience that? Have you experie
5 your practice?

6 A. No, not at all.

7 Q. Have you ever taught that to your
8 residents, your Fellows, any of the physi-
9 cians you've taught over the last 40 years?

10 A. No, not at all.

11 Q. Doctor, is it important to know wh
12 disease processes are that are going on in
13 for the treatment plan of the patient?

14 A. I think it is.

15 Q. If you have a patient who suffers from
16 both sarcoidosis and some obstructive disease
17 emphysema or chronic bronchitis, would you use the
18 regimen for the chronic bronchitis or emphysema
19 something either in addition to or different from
20 the treatment for sarcoidosis?

21 A. It would.

22 Q. And how would that change?

23 A. Well, there would be two -- two
24 that you would do differently. You would
25 inhaled bronchodilators to somebody

1 Dr. Coopersmith, 11/17/93.

2 This is after Ms. Fontana is no longer
3 flying, correct?

4 A. Yes.

5 Q. And she's thinking of taking a trip to New
6 York for the holidays, but Dr. Coopersmith
7 recommends that she drive or take a train because
8 she's had episodes of hemoptysis after flying, most
9 likely due to changes in the atmospheric pressure,
10 correct?

11 A. That's what he says, yes.

12 Q. Can you explain that to this jury?

13 A. Well, if you decrease the pressure outside
14 of a blood vessel, that means the pressure inside it
15 is higher in relation to outside pressure than it
16 was before. That's his interpretation.

17 You thin out the air but you keep your
18 same blood pressure, so the radius to the blood
19 vessel from the outside has been increased, and
20 that's the interpretation that he's putting on that
21 as I read his note.

22 Q. Good advice?

23 A. Very reasonable.

24 Q. Doctor, let me ask you something. We've
25 had a radiologist come here and tell us that

1 lung disease, to get whatever widening
2 airways you could, to improve the de
3 obstruction, to relieve the obstruction
4 extent.

5 And you would also put anti-in-
6 flammatory drugs also by inhalation. And that wou
7 steroids.

8 So those are two things that you
9 to the treatment, if you felt there was si
10 airways disease.

11 Q. Did Dr. Adelman or Dr. Greene or
12 Dr. Coopersmith ever do that for Ms. Font

13 A. No, except in September of 2000.

14 Q. Very recently?

15 **A. Very recently.**

16 Q. Why did Dr. Coopersmith do it in S
17 of 2000?

18 A. Well, the note said she was having
19 difficulty bringing up secretions. This
20 the lung was full of fungus balls and the
21 something growing in those air sacs, and
22 not only dilate airways, but they tend to
23 these little hair cells that sort of sweep
24 surface, interior surface of the airways,
25 secretions to come up to where you can

1 out. And that was the indication that I saw of
2 September the 18th, 2000.

3 Q. Did you ever see any of these doctors
4 treating Ms. Fontana for emphysema, chronic
5 bronchitis, COPD, any of those diseases?

6 A. No, I did not.

7 Q. Doctor, let me switch subjects again for
8 just a minute; and that is, are you familiar with
9 the literature on environmental tobacco smoke and
10 chronic bronchitis, emphysema and chronic
11 obstructive pulmonary disease?

12 A. I am.

13 Q. You've written on the subject, correct?

14 A. Well, not as an epidemiologist, but I've
15 described it, yes.

16 Q. And do you have an opinion as to whether
17 or not environmental tobacco smoke has been
18 scientifically proven to cause those illnesses in
19 humans?

20 A. It has not been proven, despite over 20
21 years of study.

22 Q. Now, Doctor, you're aware that certain
23 public health organizations like the Surgeon General
24 and a whole host of public health organizations have
25 said that it has been proven, correct?

1 A. No, they've not said it has been proven.
2 They say that you should avoid environmental tobacco
3 smoke.

4 Q. Well, if, in fact, they have said words to
5 the effect that it's been proven, do you take issue
6 with that?

7 A. I do take issue that it's been proven, but
8 I think they're right to have people avoid it.

9 Q. All right.

10 A. That's their duty as a public health
11 organization, as far as I'm concerned.

12 Q. Doctor, let me ask you one final question.

13 Based on your review of the medical
14 records in this case, what is the reason for which
15 Ms. Fontana is on the list to get a lung transplant?

16 A. Stage IV, end-stage sarcoidosis.

17 Q. Does environmental tobacco smoke have
18 anything to do -- her exposure to environmental
19 tobacco smoke have anything to do with her needing a
20 lung transplant?

21 A. No.

22 Q. Does she have any other disease process in
23 her lungs that is causing her to need to have a lung
24 transplant?

25 A. No.

1 MR. REILLY: Thank you.

2 No other questions, Your Honor.

3 THE COURT: Cross.

4 CROSS EXAMINATION

5 BY MR. WEINSTEIN:

6 Q. Good afternoon, Doctor.

7 A. Good afternoon.

8 Q. I'm Marvin Weinstein, and along with
9 Mr. Hunter and other co-counsel, we represent Marie
10 Fontana.

11 I'm going to ask you a few questions. If
12 you could, I'd appreciate it if you could answer yes
13 or no, if it calls for a yes or no, and then, of
14 course, if you feel it's absolutely necessary, why.
15 of course, explain your answer. Okay?

16 A. Yes.

17 Q. I think we'll move along a lot quicker
18 that way. All right?

19 A. All right.

20 Q. Now, Doctor, since my background is really
21 legal, not medical, I may ask you some simple, basic
22 questions, so you'll excuse me. All right?

23 A. Absolutely.

24 Q. Okay. Doctor, do you smoke?

25 A. No.

1 Q. Why?

2 A. I don't think it's good for you, sir.

3 Q. And it's not good for you because of why?

4 A. Because of many things: lungs, mouth,
5 heart disease, bladder.

6 Q. And, of course, if -- well, I don't --
7 there's a large pad there, but maybe we could do it
8 just with words.

9 If I asked you to list, you know, common
10 sense, if I asked you just to list all of the
11 benefits of being exposed to tobacco smoke, tell me
12 what the benefits are.

13 A. Benefits?

14 Q. Yes.

15 A. None.

16 Q. And if I asked you, on this side of the
17 list, where it says benefits, and you have a big
18 zero, none, now I want you to list for me,
19 theoretically, all of the health risks that tobacco
20 smoke --

21 A. Theoretically? Did I get that --

22 Q. No. I mean, really, tobacco smoke kills
23 people, doesn't it?

24 A. Direct, mainstream.

25 MR. REILLY: Your Honor --

1 **A. Mainstream smoke does. I think it does.**
 2 BY MR. WEINSTEIN:
 3 Q. Okay.
 4 **A. But I think if you're talking about**
 5 **environmental tobacco smoke, you're asking me to**
 6 **make a judgment that the science has not proven.**
 7 Q. All right. We'll get to that, I assure
 8 you. I only want --
 9 **A. Then I can't make the list until you do.**
 10 Q. Well, let's talk then first about
 11 mainstream smoke.
 12 **A. Fine.**
 13 Q. Now, tell me all -- now, when we're
 14 talking about mainstream smoke, we're talking about
 15 the smoke that the smoker inhales, right?
 16 **A. We are.**
 17 Q. Okay. That's tobacco smoke, isn't it?
 18 **A. It is.**
 19 Q. Okay. Tell this jury all of the risks
 20 that you can think of at this time in being exposed
 21 to that. They've already heard that there's great
 22 similarity between mainstream and sidestream.
 23 They've heard that.
 24 I just want to ask you, first now, about
 25 mainstream smoke. Tell the jury all of the risks,

1 have died in all of the wars that we know about
 2 probably overall; isn't that right?
 3 **A. Well, I don't know about that.**
 4 Q. You don't know the data on that?
 5 **A. I do not know the data on that.**
 6 Q. Okay. You're not suggesting that, I
 7 assume, that Marie Fontana -- you're not suggesting
 8 that environmental smoke was really good for her and
 9 her sarcoidosis, are you?
 10 **A. Not good for her, not at all.**
 11 Q. Okay. It didn't do her sarcoidosis any
 12 good, right?
 13 **A. Nor any harm.**
 14 Q. Uh-huh. And, of course, you've read the
 15 testimony of other doctors, other people with
 16 credentials, that feel that it contributed or
 17 accelerated that condition; is that correct?
 18 **A. Yes.**
 19 Q. Okay. Now, Doctor, we know that medicine
 20 is not an exact science, don't we?
 21 **A. We do.**
 22 Q. Yes. And as a result of that fact, that
 23 it's not an exact science, we know that frequently
 24 doctors differ in their opinions, correct?
 25 **A. They do.**

1 health risks that you say, well, now, there is
 2 sufficient data.
 3 **A. Oh, I think there are for mouth cancer,**
 4 **throat cancer, lung cancer, chronic obstructive lung**
 5 **disease, in susceptible individuals, premature**
 6 **coronary arteriosclerosis, is susceptible in**
 7 **individuals.**
 8 Q. That's hardening of the arteries; is that
 9 what that is?
 10 **A. That is hardening of the arteries.**
 11 Q. Causing all kinds of other problems,
 12 right?
 13 **A. Strokes, heart attacks, yes.**
 14 Q. Can you think of any other product that's
 15 causing more problems with human beings in this
 16 country or the world and contributes to disease than
 17 that?
 18 **A. You're asking me to think of something in**
 19 **the range of heart disease, lung disease, all of**
 20 **that?**
 21 Q. Well, it's caused more illnesses and
 22 deaths. that is, tobacco smoke, than any other
 23 product; isn't that right?
 24 **A. Mainstream tobacco smoke has, yes, sir.**
 25 Q. Probably more than all of the people that

1 Q. Yes.
 2 And you have one opinion, which you've
 3 espoused here, and you know that other doctors have
 4 been called by the plaintiff, such as Dr. Irvin,
 5 Dr. Foley, et cetera, who expressed a differing
 6 opinion from you, correct?
 7 **A. That's what I'm told, yes.**
 8 Q. And as a matter of fact, you have stated
 9 that ETS. environmental tobacco smoke, that in your
 10 opinion doesn't cause any problems; what you're
 11 saying is, as I understand your opinion, and correct
 12 me if I'm wrong, to you it's just kind of an
 13 uncomfortable irritation; isn't that correct?
 14 **A. That's all the data supports, sir, at this**
 15 **point.**
 16 Q. So if you go --
 17 **A. So it's not a matter of opinion; it's my**
 18 **conclusion after looking at the data.**
 19 Q. Well, because you say the data doesn't
 20 support it, so you decide, since there's not
 21 sufficient data, "I'm going to come down on the side
 22 of saying that it doesn't cause this problem,"
 23 rather than saying, "I don't know;" there's no data
 24 either way, is what you're trying to tell this jury;
 25 isn't that right? Isn't that what it comes down to?

1 A. Yes, sir. That's what it comes down to.
 2 Q. Okay. So you're not saying within
 3 reasonable medical probably it doesn't cause or
 4 contribute to the sarcoidosis or aggravate it, you
 5 just say there's not enough data to convince you;
 6 isn't that right?
 7 A. Me or anybody else with a scientific
 8 background, that's true.
 9 Q. Well, Dr. Irvin has a scientific
 10 background, and he's well respected in his field as
 11 a pulmonologist. You've recognized that?
 12 MR. REILLY: Objection.
 13 A. Dr. Irvin is not a pulmonologist.
 14 Q. Excuse me. A physiologist?
 15 A. He is a Ph.D. physiologist.
 16 Q. And you know what specialty that is, don't
 17 you?
 18 A. Yes, I do.
 19 Q. Yes. Okay.
 20 And you've heard about Dr. -- you've
 21 heard about the testimony of Dr. Foley, correct?
 22 A. I've been told about it.
 23 Q. He's a medical doctor, isn't he?
 24 A. Yes. He's a radiologist, I believe.
 25 Q. Yes.

1 And you disagree with his conclusion about
 2 the effects that ETS has on sarcoidosis, correct?
 3 MR. REILLY: I object, Your Honor.
 4 Dr. Foley expressed the same opinions Dr. --
 5 MR. WEINSTEIN: That's --
 6 THE COURT: Overruled.
 7 Ladies and gentlemen of the jury, you rely
 8 upon your own recollection of the testimony and
 9 evidence.
 10 THE WITNESS: I'm sorry.
 11 BY MR. WEINSTEIN:
 12 Q. If Dr. Foley testified that it either
 13 contributed or caused or accelerated her
 14 sarcoidosis, you just disagree with that, right?
 15 MR. REILLY: I object, Your Honor.
 16 A. I would.
 17 THE COURT: Overruled.
 18 A. I would.
 19 BY MR. WEINSTEIN:
 20 Q. And that's one of those -- that's in that
 21 area where doctors can disagree on opinions,
 22 correct?
 23 A. It is.
 24 Q. Now, Doctor, when a doctor --
 25 incidentally, you never examined Marie Fontana, did

1 you?
 2 A. No, I didn't.
 3 Q. You never did a hands-on examination, such
 4 as the type that -- you say you treat patients,
 5 correct?
 6 A. Correct.
 7 Q. And you know that defendants -- that
 8 tobacco, they have an opportunity and they have the
 9 right to ask any doctor they wanted to examine our
 10 client; you know that, don't you?
 11 A. I do.
 12 Q. And they never asked for any doctor, are
 13 you aware of that, to examine her hands-on?
 14 A. I'll take your word for it.
 15 Q. Thank you. Thank you.
 16 And, Doctor, when you doctors take a
 17 history in order to diagnose, almost always, if not
 18 always, you ask whether or not a person is a smoker,
 19 don't you?
 20 A. We do.
 21 Q. That's very important in diagnosing the
 22 problems that a patient has; isn't that right?
 23 A. It is.
 24 Q. That's because smoking, cigarette smoke
 25 itself, causes or aggravates the person, in general,

1 even if they're healthy, correct?
 2 A. Yes.
 3 Q. Indeed, it even aggravates or increases
 4 problems that a person might have with an underlying
 5 condition, correct?
 6 A. I'm sorry. Say that again for me.
 7 Q. I'm just asking if you put aside whether
 8 tobacco smoke causes any problem, tobacco smoke can
 9 aggravate an underlying condition?
 10 A. Irritate anyone, yes.
 11 Q. Well, if someone has asthma, tobacco
 12 smoke --
 13 A. Absolutely. There's some asthmatics that
 14 absolutely get an asthma attack.
 15 Q. You know, that's what I was thinking of.
 16 An underlying condition. It's going to give them a
 17 lot of problems, right?
 18 A. Well, it's going to give them an
 19 inconvenience that they can treat themselves. If
 20 they're sensitive in the nose, it will give them a
 21 runny nose.
 22 Q. ETS --
 23 A. If they're sensitive in the skin, it will
 24 give them a rash.
 25 Q. So environmental tobacco smoke is just an

1 irritation, and it doesn't cause anything, in your
2 opinion, because there's no data to support it
3 basically, right?

4 **A. That is correct.**

5 Q. But if a scientist really wants -- back in
6 1940, there were an awful lot of doctors in the
7 tobacco industry, they were saying that we don't
8 have enough data to even prove direct smoke causes
9 cancer and all those underlying health disorders;
10 isn't that true?

11 MR. REILLY: I would object.

12 **A. Some were --**

13 THE COURT: Overruled.

14 **A. -- but we were smarter in high school
15 growing up. We called them coffin nails and cancer
16 sticks.**

17 BY MR. WEINSTEIN:

18 Q. You're right. And, however, wasn't it
19 true in 1940, you didn't have -- you didn't have
20 data to support the fact that cigarette smoke caused
21 cancer and respiratory disorders and COPD and
22 emphysema; you didn't have data to support that, did
23 you?

24 **A. It looked awfully suspicious, sir.**

25 Q. Did you have data, sir?

1 BY MR. WEINSTEIN:

2 Q. So you don't know whether or not the
3 tobacco industry, with various doctors that they --
4 that were on their staff, or that they paid, were
5 maintaining that tobacco smoke didn't cause any
6 kinds of problems, didn't cause cancer, didn't cause
7 respiratory disorders; you know that. Doctor, don't
8 you?

9 **A. No, I don't.**

10 Q. You were around in 1940, weren't you?

11 **A. I was five years old, sir.**

12 Q. You're right.

13 **A. I think I was -- I was interested in
14 popsicles and lollipops.**

15 Q. Okay. When do you think they started --
16 when do you think they started collecting the data?

17 **A. Well, the whole public health movement
18 really began in earnest, other than infectious
19 disease, after World War II.**

20 Q. Right, and the public health movement --
21 as a matter of fact, usually the head guy in the
22 public health movement is the Surgeon General of the
23 United States, right?

24 **A. He is. The head of the Public Health
25 Service. Absolutely.**

1 **A. Not completely, because data weren't even
2 being collected that way in those days.**

3 Q. Well, that's my -- well, if it wasn't
4 being collected, then you didn't have it, correct?

5 **A. That's right.**

6 Q. Well, all I did was, like I said, when I
7 first got up here, I said: Doctor, could you please
8 answer yes or no, if it calls for a yes or no.

9 Did you have data in 1940 that tobacco
10 smoke caused any problem -- caused cancer or COPD,
11 or any of those?

12 **A. No, because nobody had any data at that --
13 data collection at that time.**

14 Q. And there were doctors just like in you
15 those days that supported the tobacco industry, that
16 came into court and took the position there's no
17 data to support that smoking causes cancer; you know
18 that, don't you?

19 MR. REILLY: I would object, Your Honor.

20 **A. I don't --**

21 THE COURT: Overruled. If he knows, he
22 can answer.

23 **A. I don't know that. I didn't follow the
24 court cases.**

25

1 Q. Okay. And the Surgeon General is the top
2 doctor in this entire country; isn't that right?
3 He's referred to as the top doctor in this country,
4 correct?

5 **A. He is the top politically-connected doctor
6 in the United States.**

7 Q. Well, it's nice that you sort of threw
8 that out.

9 Doesn't that doctor have to go through
10 peer review first himself? Doesn't he get
11 recommendations from the American Medical
12 Association, and doesn't he have to have the
13 credentials in order to first become cross-examined
14 and interviewed --

15 **A. He has to be an MD and has to be
16 reasonably respected in a public forum.**

17 Q. Do you know Dr. Richmond?

18 **A. I do know Julius Richmond.**

19 Q. A highly respected gentleman?

20 **A. Yes. He's a wonderful pediatrician.**

21 Q. And do you know about his -- the attorney
22 general --

23 **A. Surgeon General.**

24 Q. -- the Surgeon General's Report?

25 **A. Yes.**

1 Q. In which they all concluded, after
2 exhaustive investigation, based on the bibliography.
3 of the effects of environmental smoke -- have you
4 read that report?

5 A. Yes, sir.

6 MR. REILLY: Objection, Your Honor.

7 A. Are you talking about the '85 report?

8 MR. REILLY: Your Honor, I have to object.

9 Mr. Weinstein has indicated that Dr. Richmond
10 prepared some Surgeon General's Report that has
11 to do with environmental tobacco smoke, and
12 it's just completely wrong.

13 A. It was C. Everett Koop.

14 THE COURT: Excuse me.

15 Ask your question again.

16 MR. WEINSTEIN: Yes. Thank you, Judge.

17 BY MR. WEINSTEIN:

18 Q. Do you know who the writer of that
19 report -- of the report that I'm referring to, the
20 one -- the report that concluded about the dangers
21 of environmental smoke and that it caused -- do you
22 know who the doctor was?

23 A. You confuse me, because I'm aware of the
24 mid-'80s report at the time, that C. Everett Koop
25 was Surgeon General.

1 Q. Do you know a Dr. Burns?

2 A. Yes. I know of a Dr. Burns.

3 Q. Okay. Is he also -- the jury has listened
4 to the testimony of Dr. Richmond, the Surgeon
5 General at the time; and has also heard the
6 testimony of Dr. Burns, who wrote the report, after
7 exhaustive investigations and peer-review and
8 approval, the report. Have you seen those -- that
9 testimony?

10 A. I've seen the report.

11 Q. Have you seen -- have you been -- did the
12 tobacco lawyers ask you to review their testimony
13 that this jury has seen?

14 A. No, they did not.

15 Q. Have they supplied you with the transcript
16 of their testimony?

17 A. No, they have not.

18 Q. Tell me something. If everything being
19 equal, does it take a greater or less exposure to
20 tobacco to cause cancer or to cause emphysema?

21 A. Would you mind rephrasing that again?

22 Q. Yes.

23 In your opinion, everything being equal,
24 the same person, theoretically, I assume, and does
25 it take more exposure over a longer length of time

1 in order for somebody to come down with cancer of
2 the lung than to come down with emphysema? What
3 would you say?

4 A. That comparison has not been done.

5 There's a great deal of shared susceptibility to both
6 of those disorders.

7 Q. Okay. Of course, you're not a
8 radiologist, are you?

9 A. No, but I was trained in chest radiology
10 as being a pulmonologist.

11 Q. In your practice, you called in an awful
12 lot of times radiologists, we've seen it on the
13 board, where they show someone in your specialty --
14 tobacco lawyers put it up there -- and it showed how
15 you all consult these -- I think you even referred
16 to that diagram, showed that you consult with
17 radiologists, don't you?

18 A. We do.

19 Q. And you call them in on consultation?

20 A. We read our own many times, but we call
21 them in for special studies and some special
22 procedures, such as the plaintiff had.

23 Q. And you call them in -- you call them in
24 to ask their opinions and advise you?

25 A. Oh, absolutely. It goes both ways.

1 Q. Do you know -- you talk about data, right?
2 There's no sufficient data, and so, therefore, you,
3 I guess, have no opinion as to whether ETS causes
4 cancer or emphysema, correct?

5 MR. REILLY: Asked and answered, Your
6 Honor.

7 THE COURT: Overruled. Sustained.

8 A. I thought I answered that.

9 Q. Would that be a correct statement?

10 THE COURT: I sustained it. It was asked
11 and answered.

12 BY MR. WEINSTEIN:

13 Q. Well, Doctor, in order to accumulate data,
14 as the medical people do and as scientists do, what
15 you would ordinarily do -- the best test would be to
16 find out whether ETS, in other words, secondhand
17 smoke, causes illness, causes cancer, causes COPD. a
18 perfect way to do it would be to get a bunch of
19 nonsmokers, to see if it cause disease in
20 nonsmokers, put them in a container, take one, two,
21 maybe three thousand nonsmokers, put them in a
22 container, in an enclosed space, and maybe two,
23 three, four times a week, for a period of five or
24 six hours, over a period of one year, five years,
25 ten years, 15 years, 20 years, 22 years, and subject

1 them to secondhand smoke that way, and then you'd be
2 able to say -- you might come up with some
3 statistics as to how much of them have come down
4 with cancer, how many have come down with COPD, how
5 many of them have come down with emphysema, and any
6 other kind of diseases; that would be a perfect way
7 of doing it, wouldn't it?

8 **A. You said "might."**

9 **Q. Yes.**

10 **A. So I need to have some more**
11 **qualifications.**

12 **Q. I'm saying if we put them --**

13 **A. Is there no ventilation system?**

14 **Q. No.**

15 **A. Not at all?**

16 **Q. There is air conditioning and a**
17 **ventilation system, yes.**

18 **A. No filtration, no ventilation system?**

19 **Q. Yes.**

20 **A. I'd have to know more about that.**

21 **Q. But it would be a good way to perform a**
22 **test, right?**

23 **A. It would, if you could match it with a**
24 **control group.**

25 **Q. Of course. Then you would have data?**

1 **A. With a control group, you would have data.**

2 **Q. Okay.**

3 **A. You would.**

4 **Q. We'll take nonsmokers, put them in this**
5 **container where we're just recirculating the air**
6 **with some filters --**

7 **A. Total recirculation over here.**

8 **Q. Humn? What?**

9 **A. Okay.**

10 **Q. And for five, ten, 15, 20 years, we'll**
11 **take nonsmokers and not subject them to that, and**
12 **we'll have a control group, right?**

13 **A. Okay. Where is -- where is the smoke?**

14 **Q. We're putting --**

15 **A. Which group is the smoke going to be in?**
16 **I'm trying to follow you.**

17 **Q. We're putting -- we're taking two groups**
18 **of nonsmokers --**

19 **A. Okay.**

20 **Q. -- one is subjected for one, five, eight,**
21 **ten, 15, 22 years in a container, whereby they're**
22 **subjected to secondhand smoke --**

23 **A. Okay.**

24 **Q. -- that is, the smoke that comes out of**
25 **the front of a cigarette --**

1 **A. Okay.**

2 **Q. -- and smoke that comes out of someone's**
3 **mouth who's already put it in their lungs and puffed**
4 **out the impurities, so that the nonsmoker is also**
5 **subjected to that?**

6 **A. I got my two groups here now.**

7 **Q. Okay. And the other group is just -- the**
8 **other group --**

9 **A. Fresh air.**

10 **Q. Fresh air.**

11 **A. Okay.**

12 **Q. Then we wait the 15 or 20 years, and then**
13 **we control the two groups -- then we examine the two**
14 **groups. That would give you good data, wouldn't it?**

15 **A. If they were equal in all other respects,**
16 **you're exactly right. That would be a very good way**
17 **to do it.**

18 **Q. I was thinking about that, and where do**
19 **you think you're going to find nonsmokers to**
20 **volunteer for that test?**

21 **MR. REILLY: Objection, Your Honor. It's**
22 **argumentative.**

23 **THE COURT: It's argumentative.**
24 **Sustained.**

25

1 **BY MR. WEINSTEIN:**

2 **Q. Do you think you could find any nonsmokers**
3 **that would volunteer to undergo that type of**
4 **condition?**

5 **MR. REILLY: Objection, Your Honor.**

6 **THE COURT: Overruled.**

7 **A. It would depend on the inducement, I would**
8 **think.**

9 **Q. Depends on the inducement. Do you think**
10 **you can get one or two or three -- a hundred people**
11 **that would say, "Yes, I'm going to subject myself to**
12 **secondhand smoke, with people puffing around -- two,**
13 **three times a week, five, six" -- you think you're**
14 **going to find many?**

15 **A. You're asking me to speculate --**

16 **Q. No, I'm asking --**

17 **A. -- on human behavior.**

18 **Q. I'm asking you to use your common sense.**

19 **MR. REILLY: Objection, Your Honor.**

20 **THE COURT: Overruled.**

21 **A. I think I would ask you, in turn, to use**
22 **yours.**

23 **Q. Well, that --**

24 **A. Because it depends on the magnitude of the**
25 **inducement, sir.**

1 Q. So what you're saying, if someone paid
2 them enough, is that what you're trying to say?
3 A. That's what I'm saying.
4 Q. So you think if someone paid them enough,
5 they would subject themselves, some people would
6 subject themselves. Do you think you could get
7 3,000 people to do that?

8 MR. REILLY: Objection, Your Honor.

9 THE COURT: Overruled.

10 BY MR. WEINSTEIN:

11 Q. Easily? Humn?

12 A. I should imagine so, if I could induce
13 them enough.

14 Q. Well, sir, what if -- we have here an
15 airline attendant who claims that she was subjected
16 to exactly the same or similar conditions that I
17 just described to you; that is, she was in a
18 container with some ventilation over a period of 20
19 years, 22 years, and she has come down after that
20 with respiratory disorders.

21 Now, we also know that she was not alone.
22 There are other flight attendants. We know that,
23 don't we?

24 A. Yes.

25 Q. Do you know how many flight attendants who

1 stick.

2 Q. Let me finish, sir.

3 It didn't stick.

4 Do you know how many of t
5 involve people who actually have bee
6 have died from cancer, I'm talking at
7 attendants that have been subjected
8 15, 20, 25 years, do you know how m
9 many of their relatives have filed clai
10 they were subjected to secondhand
11 and in airline cabins over a period of
12 15, 20 years and have been diagnosed
13 as having cancer --

14 MR. REILLY: Objection, Your Honor.

15 Q. -- from secondhand smoke?

16 THE COURT: Overruled.

17 A. I lost you somewhere.

18 Q. You don't know, do you?

19 A. Don't know what?

20 Q. You don't know how many --

21 A. I don't know what you asked.

22 Q. I asked you, do you know how
23 there are in this courthouse --

24 A. I think I told you I did not kn

25 MR. REILLY: Objection, Your Honor.

1 are similarly situated under the same conditions
2 have also suffered respiratory disorders?

3 A. No.

4 Q. You didn't investigate that before you
5 decided to come here in court and say that you don't
6 know whether or not environmental smoke causes
7 disorders, when you know that Ms. Fontana, along
8 with flight attendants, have been subjected to this
9 over 10, 15, 20, 25 years; do you know how many of
10 them have pending claims --

11 MR. REILLY: Objection, Your Honor.

12 THE COURT: Overruled.

13 MR. REILLY: Sidebar.

14 THE COURT: Overruled.

15 BY MR. WEINSTEIN:

16 Q. -- because of respiratory disorders?

17 A. You want a yes or no on that?

18 Q. Yes. I would like to have a yes or no.

19 A. You've had a long, long, long-winded
20 clause. I think I'm no to that question, but I lost
21 you somewhere in the middle.

22 Q. Tobacco didn't tell you -- tobacco lawyers
23 didn't tell you how many claims existed for people
24 who --

25 A. They may have told me, but it didn't

1 BY MR. WEINSTEIN:

2 Q. Don't you think it would have b
3 idea to find out, before you came into
4 courtroom to decide, to venture an op
5 whether secondhand smoke can cause
6 disorders and cancer and COPD from sec
7 by examining and trying to find out w
8 similarly situated, people under the sa
9 as Ms. Fontana, how many claims and b
10 are suffering from these disorders?

11 A. I thought I was here to see wh
12 Mrs. Fontana had anything in additio
13 sarcoidosis, causing her end-stage b

14 Q. No, but you --

15 A. And I have shown you the reaso
16 think not.

17 Q. But you ventured an opinion also
18 you don't think there's sufficient data to
19 to show you that environmental smoke
20 disorders and cancer and COPD. Didn't
21 right on that stand there?

22 A. I did.

23 Q. All right. And you don't think it
24 relevant to find out how many airline at
25 had the very -- who were subjected to th

1 environmental smoke on the airlines, how many of
 2 those also have the same or similar complaints?
 3 **A. I'm not sure the number is relevant to the**
 4 **point you're trying to make, but --**
 5 Q. It's in the thousands, isn't it?
 6 MR. REILLY: Objection, Your Honor.
 7 THE COURT: Overruled.
 8 **A. I think I -- I'm not sure. I'm -- it**
 9 **didn't stick, but there are quite a few. And the**
 10 **motivations are clear.**
 11 BY MR. WEINSTEIN:
 12 Q. Oh, the motivations are clear?
 13 **A. Yes.**
 14 Q. As a matter of fact, you're one of those
 15 doctors that think if anybody files a lawsuit,
 16 they've got to only be thinking about money, not
 17 that somebody was killed or injured; isn't that
 18 correct?
 19 MR. REILLY: Objection, Your Honor.
 20 **A. That is not true.**
 21 THE COURT: Overruled.
 22 BY MR. WEINSTEIN:
 23 Q. Are you suggesting to this jury that if a
 24 husband, a surviving husband is here, has filed a
 25 claim against the tobacco companies because his wife

1 died of cancer that was caused by secondhand smoke,
 2 are you suggesting he has -- that the surviving
 3 husband has another motivation; it's money, not
 4 because the person -- not because his wife died; is
 5 that what you're suggesting to this jury?
 6 MR. REILLY: Objection, Your Honor.
 7 THE COURT: Overruled.
 8 **A. No. I'm not suggesting that, sir.**
 9 Q. All right.
 10 **A. That's really a transmodification.**
 11 Q. Well, you have suggested, did you not, in
 12 your deposition, that if anybody filed a lawsuit,
 13 they got -- they have -- they're thinking about
 14 money as result of this, don't you?
 15 **A. It's a frequent --**
 16 MR. REILLY: Objection, Judge.
 17 **A. -- stimulus.**
 18 THE COURT: Overruled.
 19 BY MR. WEINSTEIN:
 20 Q. Let's talk about money, then, and
 21 motivation.
 22 How much have you been paid so far by the
 23 tobacco people. It's over \$12,000, isn't it?
 24 **A. On the Fontana case?**
 25 Q. I'm talking about tobacco. How much

1 money -- we were on the subject of motivation and
 2 money.
 3 I'm asking you whether -- how much money
 4 have you been paid by tobacco as of the time we took
 5 your deposition?
 6 **A. As of the time you took my deposition --**
 7 **I'm not sure. It was around seven or \$8,000. I'm**
 8 **trying to -- do you remember the date of the**
 9 **deposition?**
 10 Q. It wasn't too long ago, actually. In
 11 fact, Mr. Hunter took your deposition.
 12 **A. Yes.**
 13 Q. That was March 14th of 2001.
 14 **A. Okay. That was about, for the year, it**
 15 **was -- had been \$3,000.**
 16 Q. Okay. For that year. How about before
 17 that? I --
 18 **A. Before that, it involved a complete**
 19 **literature search and two -- reviewing two other**
 20 **cases, so it was about \$15,000.**
 21 Q. 15,000?
 22 **A. For the year 2000.**
 23 Q. 15?
 24 **A. 15.**
 25 Q. 15 what?

1 **A. 15,000.**
 2 Q. Well, I said 12,000. I underestimated.
 3 All I did was ask you how much tobacco paid you; I
 4 didn't ask you in the year 2000, 2001, whatever.
 5 So you were paid over \$15,000 already,
 6 correct?
 7 **A. Over the last year and a half, that's**
 8 **correct.**
 9 Q. And you're working on other cases for
 10 them, aren't you?
 11 **A. Not at this point.**
 12 Q. Well, didn't you investigate two -- at
 13 least two other cases that you expect they're going
 14 to call you?
 15 **A. I did. I don't suspect they are.**
 16 Q. You talk about data. You talk about, you
 17 know, being a scientist.
 18 I want you to assume for a moment that RJ
 19 Reynolds called a chemist or an engineer and he
 20 said, "You know, I got this machine, and it
 21 measures -- it measures how much tobacco smoke is in
 22 the area, and we found out that even though people
 23 were complaining, they thought they were exposed to
 24 an awful lot of tobacco, and I measured it, and it
 25 was a very little, teeny-weensie, little tiny

1 amount."

2 As a scientist, as a person in the medical
3 field -- I think they called it a microbit or
4 whatever, or a nanogram. He said the measurement,
5 these people complained about all that tobacco, and
6 when we measured it, it was a very small amount.

7 What would your conclusion be? What would
8 that tell you?

9 **A. I don't know the measurements you're**
10 **talking about.**

11 Q. Well, I'm telling you he said it was a
12 very small amount. He said, "We measured the
13 tobacco smoke after all these people complained
14 about being bothered by this tobacco, and we found
15 out it was really a very small amount." Does that
16 tell you something?

17 **A. Well, I need to know more about the**
18 **machine, how they calibrate it, how accurate it is,**
19 **where the sampling took place.**

20 Q. Let's assume it's correct.

21 **A. Okay.**

22 Q. If you take the statement on the one hand
23 that it was a very small amount and that people
24 thought they were subjected to a lot more, and they
25 were bothered by it, wouldn't you conclude that,

1 therefore, it takes a very small amount, a nanogram,
2 to cause this discomfort and irritation?

3 **A. That would be one possible conclusion.**

4 Q. Possible. Wouldn't it be the actual
5 conclusion; that is, gee, you know, all of these
6 people and all of these attendants, flight
7 attendants, and all of these passengers are
8 complaining about the smoke bothering their eyes and
9 their noses and their sinuses, and then when we
10 measured it, it was such a small amount. Doesn't
11 that prove a small amount bothers them and irritates
12 them?

13 **A. They could be making poor measurements,**
14 **too. I don't know.**

15 Q. So then the RJ measurements are wrong,
16 right?

17 **A. I have no idea whose measurements you're**
18 **talking about, but those are the two possibilities.**

19 Q. Of course, if they have a machine that's
20 measuring it, a machine doesn't have lungs, a
21 machine -- it's a mechanical machine. It doesn't
22 cough, does it, as Mr. Hunter says, right?

23 **A. I assume not.**

24 Q. It doesn't have eyes that get red and are
25 irritated, does it?

1 **A. I assume not.**

2 Q. And, of course, the tobacco in the machine
3 doesn't accumulate like tobacco residue does in
4 someone's lungs, correct?

5 **A. I don't know the machine you're talking**
6 **about.**

7 Q. Okay. They didn't tell you about that?

8 **A. Tell me about what?**

9 Q. About the machine.

10 **A. No.**

11 Q. That they came in and showed this jury,
12 that, "Hey, it's just a small, little bit amount.
13 Gee, most people thought they were exposed to a lot
14 more."

15 **A. I don't know anything about that.**

16 Q. You know if you have a smoker, a heavy
17 smoker or whatever, if you perform an autopsy,
18 assuming the person died, obviously, and you look at
19 the lungs, you can tell the difference between the
20 lungs, generally speaking, of a smoker or a person
21 subjected to smoke; you could tell a smoker's lungs
22 as compared to a person who doesn't smoke, can't
23 you?

24 **A. You can.**

25 Q. I mean, what can you see? It's actually

1 observable, right?

2 **A. Yes.**

3 Q. What --

4 **A. You see a brown pigment.**

5 Q. And that tells you, doesn't it, that when
6 somebody breathes in tobacco, all that tobacco is
7 not --

8 **A. It tells you that.**

9 Q. It tells you what? Just maybe you could
10 complete my sentence.

11 **A. Just what you said.**

12 Q. That all of the tobacco, the smoke doesn't
13 go out of your lungs, even though you're puffing it
14 out; some of it remains?

15 **A. Some constituents of it remain, yes, sir.**

16 Q. Yes. And over one year, three years, five
17 years, and 10 years, if you're breathing in tobacco
18 smoke and then breathing it out, whether you're a
19 voluntary smoker and you choose to smoke or you're
20 an involuntary smoker and you choose not to smoke
21 and you breathe in other people's smoke, all of the
22 tobacco residue, no matter how small or large it is,
23 is not out of your lungs totally, correct?

24 **A. You have linked -- linked active smokers**
25 **with environmental tobacco smoke. If you --**

1 Q. I'm just asking questions. Don't --
 2 don't --
 3 THE COURT: Let him finish his answer.
 4 A. If you don't separate those two, I cannot
 5 answer your questions yes or no.
 6 BY MR. WEINSTEIN:
 7 Q. So you can't answer my question yes or no?
 8 A. Unless you separate environmental tobacco
 9 smoke effects from mainstream smoke effects.
 10 Q. Well, let's talk a moment about that
 11 separation.
 12 A. Fine.
 13 Q. We know that a nonsmoker like Ms. Fontana,
 14 she doesn't smoke, so she's exposed to what is
 15 called sidestream smoke; that is, the smoke that is
 16 coming out of the front of the cigarette, correct --
 17 A. Yes.
 18 Q. -- of another smoker, and also the smoke
 19 that's coming out of the mouth of that smoker,
 20 correct?
 21 A. That's correct.
 22 Q. All right. But, also, the smoker, him or
 23 herself is subjected to not only the smoke they
 24 breathe in and breathe out, but also sidestream
 25 smoke, too? They're sitting or standing in the area

1 in which the front of the cigarette is -- smoke is
 2 coming out of there, too, right?
 3 A. Yes.
 4 Q. Humn?
 5 A. Yes.
 6 Q. Is there any data to support the effect on
 7 the smoker, how much of the sidestream smoke that
 8 comes out of the front that the smoker breathes in,
 9 as compared to the smoke that he inhales directly,
 10 how much one or the other contributed to disease or
 11 cancer?
 12 A. I'm sorry. You asked me about an active
 13 smoker?
 14 Q. Yes.
 15 A. And you said sidestream smoke to --
 16 mainstream smoke, the smoker, him or herself --
 17 Q. Yes. What I'm trying -- what I'm asking
 18 you is this: Have you ever -- let's assume there is
 19 a smoker or many smokers who have come down with
 20 cancer and died. Okay? That smoker has been
 21 subjected to their own smoke that they breathe in
 22 and puff out and environmental smoke, correct?
 23 A. Sidestream.
 24 Q. Yes. Sidestream?
 25 A. I haven't seen such a study. I'd like to

1 see it.
 2 Q. No data. That's one of your "no data"
 3 things, right? So there's no data, right? There is
 4 no data on whether or not the person came down with
 5 the cancer from the environmental smoke and not the
 6 smoke he breathed in?
 7 A. That's correct.
 8 Q. So you can't tell this jury that
 9 environmental smoke is really responsible for the
 10 cancer that people come down with, or whether the
 11 person came down with cancer from actually the smoke
 12 that he inhaled, correct?
 13 A. Wait a minute.
 14 Q. Because there's no data?
 15 A. I'm confused by what you just said.
 16 Q. I'm saying that you can't --
 17 A. Are you separating mainstream from
 18 environmental smoke, sir?
 19 Q. Yes. I'm saying that since --
 20 A. I --
 21 Q. -- the person who is smoking gets
 22 mainstream and environmental smoke, correct, there
 23 is no data on what is causing really the smoker from
 24 coming down with cancer, because he's subjected to
 25 both of them? Is there a study or data on which

1 caused the cancer?
 2 A. Well, active smoking has been associated
 3 very tightly with lung cancer and chronic
 4 obstructive lung disease.
 5 Q. Okay.
 6 A. Environmental tobacco smoke has not.
 7 Q. Well, of course, we know the Surgeon
 8 General has and we know an awful lot of other people
 9 have --
 10 A. He's recommended --
 11 Q. You just said there's no data, not that it
 12 hasn't been --
 13 A. I said inconclusive, I think I said, sir.
 14 Q. Inconclusive, humn?
 15 A. Yes.
 16 Q. All right. American Lung Association, did
 17 you ever hear of them?
 18 A. Yes.
 19 Q. April 2 of 2001. Could you tell me, do
 20 you know that they concluded that environmental
 21 smoke causes lung cancer and other health problems?
 22 A. That's what they said.
 23 Q. So you don't agree, then -- let's -- I
 24 don't want the jury to think I'm misstating the
 25 American Lung Association. Very highly reputed

1 of our witnesses, Judge --
 2 THE COURT: No, it's a question-to-answer.
 3 You get to ask the question, he gets to answer,
 4 and he gets to explain his answer.
 5 MR. WEINSTEIN: That's it. I told him
 6 that in the beginning, Judge.
 7 THE COURT: I understand that. Let's not
 8 get too far afield.
 9 BY MR. WEINSTEIN:
 10 Q. And, in fact, the American Lung
 11 Association even says that the efforts -- that
 12 environmental smoke in children can cause bronchitis
 13 and coughing, correct?
 14 A. That's what it says. I think that's
 15 right.
 16 Q. So as I understand it, you not only agree
 17 with the Surgeon General, and Dr. Irvin and
 18 Dr. Foley and the American -- and also with the
 19 American Lung Association, correct?
 20 THE COURT: What's your next question?
 21 Q. Isn't it true, sir, that exposure to ETS
 22 indoors, that the knowledge about the harmful
 23 effects of exposure to environmental smoke indoors
 24 has greatly expanded, and many of the deleterious
 25 effects known to be caused by active smoking have

1 now been associated with passive smoking?
 2 A. From whom are you quoting?
 3 Q. Well, that doesn't --
 4 A. No.
 5 Q. Does that matter? You don't agree with
 6 that?
 7 A. No, I don't exactly agree with that.
 8 Q. Sir, this comes from the American Thoracic
 9 Society, a society that you're the past president
 10 of.
 11 A. That's fine, sir.
 12 Q. So you, as I understand it now -- here's a
 13 report by the American Thoracic Society called
 14 "Cigarettes, Smoking and Health," March 1995, and
 15 doesn't it say that many -- am I misquoting this,
 16 under Passive -- we're talking about passive
 17 smoking, correct, here, secondhand smoke?
 18 A. We are. That's correct.
 19 Q. All right. "Many of the deleterious
 20 health effects known to be caused by active smoking
 21 have now been associated with passive smoking?"
 22 A. Have been associated with, yes.
 23 Q. Okay?
 24 A. Associated with.
 25 Q. Okay?

1 A. I agree with that.
 2 Q. Okay.
 3 A. That's why it helps me to see --
 4 Q. Okay.
 5 A. -- which I don't do very well at that.
 6 Q. And it says, "This fact supports" -- it
 7 says, "Many facts supported by the potential for
 8 adverse health outcome have been associated with
 9 intensive and/or protracted exposure to ETS."
 10 That's environmental?
 11 A. Potential for, yes, I agree with that. I
 12 do agree with that.
 13 Q. You wanted to know who wrote that. You're
 14 past president of that organization?
 15 A. Yes.
 16 Q. So you disagree with them, too?
 17 A. No.
 18 MR. REILLY: Objection. Your Honor. He
 19 just said he agreed with it.
 20 A. I agreed with it after I got to look at it
 21 myself, sir. So I'm being misquoted. I agreed.
 22 BY MR. WEINSTEIN:
 23 Q. Sir, other than the two -- this case and
 24 two other cases, please excuse me if this is a
 25 bit -- if this is repetitious. You'll tell me and

1 so will the Judge.
 2 MR. REILLY: I'll object if it's
 3 repetitious
 4 MR. WEINSTEIN: I said so will the Judge.
 5 THE COURT: Thank you.
 6 BY MR. WEINSTEIN:
 7 Q. You did not go through the health records
 8 of all -- except for three out of the many
 9 thousands, you did not go through the health records
 10 of any of these -- this unique group of airline
 11 attendants who were subjected to secondhand smoke
 12 for 10, 15, 20 years; you didn't go through their
 13 health records, correct?
 14 MR. REILLY: Objection, Your Honor.
 15 A. That is correct.
 16 THE COURT: Overruled.
 17 Q. Doctor, does a person -- would you agree
 18 that a person that is subjected to an irritant over
 19 a period of time, over a longer period of time, can
 20 cause permanent damage?
 21 MR. REILLY: Objection, Your Honor.
 22 Vague.
 23 THE COURT: Overruled. If he knows.
 24 BY MR. WEINSTEIN:
 25 Q. Permanent health --

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1 A. Can you define "irritant"?

2 Q. Well, let's put it this way, then.

3 If you have a small irritant, let's say a

4 little pebble in your shoe, if it's for a short

5 time, you know, it's kind of an irritant; you remove

6 the pebble, right?

7 A. Absolutely.

8 Q. But if you leave that pebble in there, it

9 gets to blister for a while?

10 A. That's when you get it out of your shoe

11 real fast.

12 Q. That's right. And after that, it might be

13 an open sore, correct?

14 A. It might be.

15 Q. And if you continue, after a period of

16 time, because you're subjected to that little,

17 it'sy-bitsy pebble, it might be an open sore and then

18 eventually, if you take it off, eventually, if you

19 treat it, why, it may even end up in scar tissue,

20 correct?

21 A. That's a theoretical possibility. I

22 agree.

23 Q. An open wound, ordinarily, many times will

24 end up in scar tissue, right?

25 MR. REILLY: Objection, Your Honor.

1 permanently in her lungs, correct?

2 A. Yes.

3 Q. Yes?

4 A. Yes, it is.

5 Q. And you're not claiming that

6 smoke, that is, the smoke in those

7 did Ms. Fontana any good, did you?

8 MR. REILLY: Objection. Your

9 and answered.

10 THE COURT: Overruled.

11 A. I'm not claiming it did her

12 BY MR. WEINSTEIN:

13 Q. As a matter of fact, a person

14 lung capacity, such as what you me

15 I see you're shaking your head beca

16 where I'm going -- a person who h

17 capacity, less ability, the lungs have

18 to stretch, is going to be bothered m

19 subjected to an irritant such as env

20 smoke, correct?

21 A. Bothered more.

22 Q. Than someone with -- that ha

23 capacity?

24 A. That's theoretically true.

25 Q. Well, you know, we're not ta

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1 THE COURT: Overruled.

2 A. That is true.

3 BY MR. WEINSTEIN:

4 Q. Indeed, you even have mentioned that in

5 Ms. Fontana's lungs, there is what -- what did you

6 call it, a certain kind of -- I remember you

7 mentioned some word that in my mind at least meant

8 scar tissue?

9 A. Scar tissue, fibrosis.

10 Q. Fibrosis.

11 A. Yes.

12 Q. Okay. Fibrosis is another word for scar

13 tissue?

14 A. That's what I tried to make clear, yes.

15 Q. And scar tissue is something that never

16 regenerates; by that I mean it's permanent, correct?

17 A. Most often it is, yes.

18 Q. Permanent. And when some -- and scar

19 tissue is not as elastic as ordinary tissue,

20 correct?

21 A. Not as stretchy, that's correct.

22 Q. Not as stretchy?

23 A. Yes.

24 Q. Okay. And so that condition, that is,

25 that scar tissue that's not as stretchy, is there

1 theoretics here. We're talking about

2 A. We're talking about theoret

3 some people are very sensitive to

4 this with normal lungs.

5 Q. As compared to a person who

6 capacity, and a person who has restri

7 capacity like Ms. Fontana?

8 A. Depending on the relative d

9 sensitivity, yes.

10 Q. Okay. And you're not claimi

11 her flights when she was subjected

12 was irritated on a day-to-day basis a

13 felt difficulty in breathing, you're n

14 she wasn't, are you?

15 A. I'm not saying that she wasn

16 Q. Ms. Fontana says that she was

17 and irritated by tobacco smoke on th

18 right? You're not saying she wasn't,

19 A. The medical records I review

20 reflect that, when she said she wa

21 Q. You saw records indicating tha

22 subjected to -- there's tobacco smok

23 her records, right?

24 A. Once that I saw.

25 Q. It's mentioned there, right?

1 A. Once.
 2 Q. Well, you know these doctors you're
 3 talking about, these are doctors that were primarily
 4 concerned about her sarcoidosis; isn't that correct,
 5 they were treating her sarcoidosis, correct?
 6 A. That is correct.
 7 Q. As a matter of fact, those records that
 8 were generated that you're referring to, the purpose
 9 of those records were to treat her, to treat her
 10 sarcoidosis, correct?
 11 A. To treat her?
 12 Q. Yes.
 13 A. Absolutely. Treat her.
 14 Q. Yes. They weren't -- they weren't trying
 15 to necessarily find any contributing cause; what
 16 they're trying to do is treat her sarcoidosis,
 17 correct?
 18 A. Treat her.
 19 Q. Yes.
 20 A. Her --
 21 Q. Yes.
 22 A. Whatever is wrong with her.
 23 Q. Yes.
 24 A. Absolutely. And it happened to be
 25 sarcoidosis.

1 Q. Uh-huh. And that was the primary
 2 condition that she was suffering from; isn't that
 3 correct?
 4 A. As far as I could tell, the only one in
 5 the lung.
 6 Q. Well, you saw a lot of other conditions up
 7 there from time to time, didn't you?
 8 A. No, not really.
 9 Q. Okay. Is cigarette smoke the single most
 10 important risk for COPD?
 11 MR. REILLY: Objection, Your Honor.
 12 Repetitious.
 13 THE COURT: Overruled.
 14 A. Yes. I think so, yes. Direct mainstream
 15 smoke, yes.
 16 BY MR. WEINSTEIN:
 17 Q. And as a matter of fact, you don't even
 18 consider any medical journal as authoritative, do
 19 you?
 20 A. The journal itself?
 21 Q. Yes.
 22 A. No.
 23 Q. Would you agree -- what do you mean by
 24 logically plausible?
 25 A. That means if a lot of something causes

1 something, a little of something may cause something
 2 also.
 3 Q. Okay. So, therefore, if a lot of tobacco
 4 causes something, a little bit of tobacco could
 5 cause something lesser; is that what --
 6 A. That's the plausibility argument, yes.
 7 Q. And you've heard of that plausibility
 8 argument; in fact, I think you mentioned it in terms
 9 of medical diagnosis and prognosis, correct?
 10 A. Yes. Correct.
 11 Q. As a matter of fact, you don't think that
 12 anybody would be able to even venture a guess as to
 13 the role any kind of smoke, either direct or
 14 indirect, in the pathophysiology and pathogenesis of
 15 her disease; isn't that correct?
 16 MR. REILLY: Objection, Your Honor. The
 17 question doesn't make sense.
 18 A. May I hear that again?
 19 THE COURT: Overruled. If he understands
 20 it he can answer it.
 21 A. I don't understand it, so let me have it
 22 again.
 23 BY MR. WEINSTEIN:
 24 Q. Do you think anybody -- isn't it true that
 25 you don't think anybody would be able to venture a

1 guess as to the role that any kind of smoke, direct
 2 or indirect, played in the pathophysiology and
 3 pathogenesis of her disease; does that make sense to
 4 you?
 5 A. No, sir, it doesn't. I was trying to
 6 count up the negatives and divide by two and see if
 7 I came out with an even number, and I couldn't do
 8 that. I'm sorry.
 9 Do you want to read the sentence, maybe?
 10 Q. All right. I'm going to show you -- in
 11 fact, I'll show your statement to you and ask what
 12 you mean when you say that you don't think anybody
 13 can venture a guess.
 14 A. Okay. Good.
 15 Oh, I'm talking about -- I see. By the
 16 way, that should have been mycetoma. I corrected my
 17 copy.
 18 This had to do with sarcoid. And I said,
 19 "I don't think anybody would even venture a guess as
 20 to the role any kind of smoke, either direct or
 21 indirect, played in the pathophysiology or
 22 pathogenesis of her disease, by that I mean
 23 sarcoidosis."
 24 Q. Right.
 25 A. Yes.

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1 Q. And what you're saying is you don't think
2 anyone would venture a guess as to the role that
3 smoke played on -- and that's your opinion, you're
4 not venturing an opinion; you don't want to guess,
5 right?

6 A. Well, I can explain what I mean, if that's
7 in order.

8 Q. You know Tom Petty?

9 A. I do, sir.

10 Q. And he is a -- you know him pretty well,
11 don't you?

12 A. Reasonably well, yes.

13 Q. What is his specialty?

14 A. Lung diseases.

15 Q. He's written an awful lot on --

16 A. He has.

17 Q. -- lung diseases?

18 A. He has.

19 Q. Lectures?

20 A. Yes.

21 Q. Indeed, right now he's in Europe
22 lecturing. Are you aware of that?

23 MR. REILLY: Objection, Your Honor.

24 A. No. I don't follow him week by week.

25

1 that opinion, you said, "Well, that"
2 horse race"?

3 A. Yes.

4 Q. What do you mean by that?

5 A. People differ in their interpre
6 things, and as far as I'm concern
7 indirect testimony of Tom Petty.
8 it was presented to him, for him to
9 conclusion. That has a lot to do w
10 opinion.

11 Q. And, of course, you know Dr. I

12 A. Yes.

13 Q. -- the physiologist. Very high
14 respected physiologist?

15 MR. REILLY: Objection, Your H
16 Inappropriate to comment.

17 THE COURT: Sustained.

18 BY MR. WEINSTEIN:

19 Q. You know him, correct?

20 A. I do.

21 Q. Yes. He's well-known in the ar
22 specialty, correct?

23 MR. REILLY: Same objection, Y

24 THE COURT: Sustained.

25 Q. And as a matter of fact -- have

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1 BY MR. WEINSTEIN:

2 Q. But I think that you've indicated that
3 he's a well-respected --

4 A. Absolutely sir.

5 MR. REILLY: I object, Your Honor. It's
6 inappropriate for one expert to comment on the
7 credentials of another.

8 THE COURT: Sustained.

9 BY MR. WEINSTEIN:

10 Q. And, Doctor, this jury has heard his
11 opinion, which -- and I think you've been advised
12 that it's different from yours, isn't it?

13 MR. REILLY: I object, Your Honor. This
14 jury has heard the testimony of Dr. Irvin.

15 THE COURT: He can answer the question if
16 he can.

17 A. I never heard any testimony from Tom
18 Petty. I've heard someone else say what it was.

19 BY MR. WEINSTEIN:

20 Q. I want you to assume that this jury has
21 been told that Dr. Petty's opinion on reading a
22 blind X-ray of Ms. Fontana has concluded that she
23 has emphysema. You disagree with that, don't you?

24 A. I do.

25 Q. And, in fact, when we confronted you with

1 told what his opinion is?

2 A. Whose?

3 Q. Dr. Irvin.

4 A. I read his deposition.

5 Q. Okay. Did you hear what his te
6 in court, in the courtroom?

7 A. I have not been told what the
8 was in the courtroom here, just dep

9 Q. Would you agree that anybody w
10 diffuse fibrotic process involving the
11 would be extraordinarily unusual if th
12 were, to some extent, affected?

13 A. Yes.

14 Q. Can we agree environmental tob
15 does cause acute reaction?

16 A. Yes.

17 Q. As a matter of fact, in your depo
18 you mentioned when you first -- you do
19 remember? You said that --

20 A. Yes, I did.

21 Q. Your first cigarette or when you t
22 smoke, you started to cough or got sick

23 A. That's right.

24 Q. Sometimes the body tells you som
25 not good for you?

1 **A. I concede that.**
 2 Q. Doctor, this book has been shown and read
 3 from, and I'm not going to read a whole bunch to
 4 you, just one or two statements --
 5 MR. REILLY: Objection, Your Honor --
 6 THE COURT: Overruled.
 7 Q. It's called, "The Airliner Cabin
 8 Environment, Air Quality and Safety," put out by --
 9 and it's been quoted by the Committee on Airliner
 10 Cabin Air Quality, Board of Environmental Studies
 11 and Toxicology Commission of Life Sciences, National
 12 Research Council. Do you see this book here?
 13 **A. Yes. I see it.**
 14 Q. Okay. Doctor, when we're talking about
 15 environmental smoke, I want you to assume that in
 16 1980, a questionnaire --
 17 MR. REILLY: Objection, Your Honor.
 18 Improper use of this document.
 19 THE COURT: Overruled.
 20 BY MR. WEINSTEIN:
 21 Q. I want you to assume that -- I'm reading
 22 from Page 140, so you know I don't misstate it, but
 23 I will let you see it as I'm stating it.
 24 **A. Okay.**
 25 Q. In a 1980 questionnaire study of 1,961

1 Scandinavian airline system cabin attendants, only
 2 four percent were not at all bothered by smokey air;
 3 whereas, 69 percent were bothered to a great extent.
 4 The data are shown on Table 5-4." And if we go to
 5 5-4, we find that the -- correct me if I'm wrong --
 6 but the results of this questionnaire in 1980,
 7 smokey air, four percent said -- only four percent
 8 were not bothered, but a total of 96 percent were
 9 bothered to a certain extent or to a great extent.
 10 96 percent --
 11 MR. REILLY: Your Honor, there is not even
 12 a question.
 13 THE COURT: I hope there will be one soon.
 14 MR. WEINSTEIN: There will be, Judge.
 15 BY MR. WEINSTEIN:
 16 Q. I want you to assume that's true; in other
 17 words, 96 percent said that they were bothered by
 18 that --
 19 MR. REILLY: Your Honor --
 20 Q. -- by secondhand smoke. Does that give
 21 you any cause to believe, therefore, that secondhand
 22 smoke in the environment of an airline cabin causes
 23 irritation and discomfort and ailments, whether it
 24 be permanent or temporary, in airline attendants?
 25 MR. REILLY: Objection to form, Your

1 Honor.
 2 THE COURT: Overruled.
 3 **A. Let me get the pieces there. It certainly**
 4 **causes irritation. And I would expect it to be**
 5 **temporary and not permanent, because I would have**
 6 **been amongst the 98 percent that would be bothered**
 7 **by it.**
 8 Q. Right. Now, of course, this is a
 9 courtroom. I mean, that's 96 percent of people who
 10 were bothered by it. I mean, when you're bothered
 11 by something, it kind of is an irritant --
 12 **A. Yes.**
 13 Q. -- and just as I said with the pebble, if
 14 you're irritated year after year by something, time
 15 after time, over and over again, it can result in a
 16 permanent problem, correct?
 17 **A. Theoretically. There's been 25 years that**
 18 **this has been studied in depth, and it's still**
 19 **inconclusive. I think that's important.**
 20 Q. And I'm talking about percentages. 96
 21 percent.
 22 Are you aware that this jury is required
 23 or will be -- has been instructed --
 24 MR. REILLY: Objection, Your Honor.
 25 THE COURT: Sustained. Rephrase the

1 question.
 2 Q. And why do you think at one stage the
 3 airlines started to separate smokers and nonsmokers?
 4 MR. REILLY: Objection, Your Honor.
 5 THE COURT: Sustained.
 6 Q. You remember the time, don't you,
 7 personally, when there was not a complete ban of
 8 smoking on airlines, correct?
 9 **A. Yes, I do.**
 10 Q. And you were in planes at that time,
 11 right?
 12 **A. Yes.**
 13 Q. And you, yourself, were -- was or were --
 14 were irritated by the smoke?
 15 **A. I was, yes.**
 16 Q. And as a matter of fact, you were even
 17 subjected to -- you remember those days when the
 18 cigarette companies were giving out these little
 19 three-packs?
 20 **A. Well, that goes back a deal further in**
 21 **time. I was pretty much a kid. I remember one**
 22 **flight where you got the three-packs.**
 23 Q. Encouraging people to smoke on the --
 24 **A. Oh, absolutely. The USO and many other**
 25 **organizations.**

1 Q. And where do you think they got those
2 complimentary three-packs?
3 A. **Very clearly --**
4 MR. REILLY: Objection, Your Honor.
5 THE COURT: Sustained.
6 BY MR. WEINSTEIN:
7 Q. And, of course, it's unpleasant to be
8 around a lot of smoke, right?
9 A. **It is.**
10 Q. You said before, when I asked you to
11 consider a self-contained room, and you asked me
12 whether they had filters and things like that; do
13 you remember?
14 A. **Yes.**
15 Q. Can you at least agree with me that the
16 filters on the end of every cigarette mostly doesn't
17 seem to prevent much cancer, does it?
18 A. **It would appear not.**
19 Q. And that's on every single cigarette,
20 correct?
21 A. **Not the same kind of filters I was**
22 **referring to, but, yes, to answer your question.**
23 Q. Well, it takes out impurities, but
24 obviously not enough?
25 A. **Correct.**

1 A. **They're busy.**
2 Q. They're busy all of the time and
3 walking up and down the aisle, correct?
4 A. **Yes. At least once.**
5 Q. And they're pushing --
6 A. **Carts.**
7 Q. -- pushing the carts, expending
8 of -- expending energy. They're helping
9 They're getting down blankets for people
10 down their luggage because they want
11 something out of their luggage, right?
12 A. **Yes.**
13 Q. So the airline attendants are constantly
14 breathing in and out more than the passengers
15 just sitting there, correct?
16 A. **Yes.**
17 Q. They're inhaling and exhaling at a
18 greater rate than people who are just sitting
19 passively, correct?
20 A. **Yes.**
21 Q. How would you characterize that
22 activity -- well, their activity was pretty
23 wasn't it?
24 A. **Pretty active.**
25 Q. Yes?

1 Q. And, of course, the smoke that's coming
2 out of the front of the cigarette, the environmental
3 smoke, that's not even filtered, is it?
4 A. **Correct.**
5 Q. So people that are breathing in the
6 environmental smoke coming out of the front of the
7 cigarette is unfiltered smoke, right?
8 A. **By definition.**
9 Q. You've been on airlines. Do those -- and
10 seen what airline -- you remember the days they
11 called them stewardesses?
12 A. **Yes. I do remember that.**
13 Q. Now everybody is -- you know it's a flight
14 attendant -- I guess that's gender-neutral or
15 something like that.
16 A. **I would think so. I'm happy enough with**
17 **it.**
18 Q. But it's all right.
19 They work pretty hard up there, don't
20 they?
21 MR. REILLY: Objection, Your Honor.
22 THE COURT: Overruled.
23 A. **Yes. Sure.**
24 BY MR. WEINSTEIN:
25 Q. They're pushing?

1 A. **Yes. I wouldn't call it heavy.**
2 **it's active.**
3 Q. Well, it's more than just light,
4 A. **No. I would call it light.**
5 Q. You wouldn't call it light?
6 A. **I would.**
7 Q. Now, did you read all of the articles in
8 bibliography and information that was published by
9 the Surgeon General when they issued the report
10 about environmental smoke? Did you read those
11 articles and all of the references?
12 A. **Most of them. I read them all.**
13 **out. This was the mid '80s, under the Reagan**
14 **right? Yes. I read most of them.**
15 Q. And you know when they give you a bibliography, it means they consider
16 bibliography, it means they consider it important
17 data, correct?
18 A. **That's what it's supposed to be.**
19 Q. Doctor, do you agree or disagree with
20 this statement: "The Surgeon General has
21 States has determined that smoking is a major
22 health of smokers. Smoke from cigarettes, cigars,
23 and pipes is also an irritant to many people,
24 and worsens allergic conditions in susceptible
25 concentrations. Secondhand smoke is a health hazard."

1 those with certain kinds of illness. New research
2 suggests that long-term exposure to secondhand smoke
3 may seriously threaten the health of nonsmokers"?

4 Do you agree with that statement?

5 **A. It may. I do, in the way that sentence is**
6 **constructed.**

7 Q. As a matter of fact, that statement -- you
8 waited -- you were out here in the hallway here, out
9 in the lobby, correct?

10 **A. I'm sorry?**

11 Q. You were out in the lobby of this
12 courtroom, weren't you?

13 **A. Just before I came in, yes.**

14 Q. Yes.

15 As a matter of fact, that statement is
16 posted right in the courthouse on every floor, and
17 it was pursuant to an administrative order of April
18 7th, 1994, some six or seven years ago, correct?

19 **A. Well, no, I didn't read it. I'll take**
20 **your word for it.**

21 Q. That's one of the reasons that smoking is
22 prevented inside this building, because of the
23 statement I just read?

24 MR. REILLY: Objection, Your Honor.

25 THE COURT: Sustained.

1 **A. Yes.**

2 Q. So it's seven and a half pages with
3 another author, you wrote in that chapter, correct?

4 **A. Yes.**

5 Q. Doctor, Mr. Reilly went over some reports
6 with you and said -- about X-ray reports. Do you
7 remember he put up the names --

8 **A. Yes.**

9 Q. -- of some other radiologists? Do you
10 remember that?

11 **A. Yes, I certainly do.**

12 Q. Okay. And in an interesting way, he said:
13 "Did this doctor -- did this radiologist find
14 emphysema?" And you responded, and you said, "No."

15 **A. That's correct.**

16 Q. The fact of the matter is, all -- all that
17 you said, what really is a fact is that the report
18 doesn't disclose anything about emphysema, correct?

19 **A. Correct. The report, in the description.**

20 Q. Right. Of course, we do know that
21 Dr. Gardiner did find COPD and air trappings, which
22 is consistent with Dr. Irvin and consistent with
23 Dr. Petty and consistent with Dr. Foley, correct?

24 **A. I don't know about Dr. Petty. I have not**
25 **heard his direct or read his direct testimony, but**

1 BY MR. WEINSTEIN:

2 Q. That new research -- isn't that correct?

3 MR. REILLY: Sustained.

4 MR. ENGRAM: Sustained.

5 THE COURT: I sustained it.

6 BY MR. WEINSTEIN:

7 Q. Did you happen to read it when you were
8 out there?

9 **A. No. I thought I answered that. No, I did**
10 **not read it.**

11 Q. Now, Doctor, counsel asked you a question
12 about -- that you had written a chapter in
13 Harrison's. Do you remember that question?

14 **A. Yes.**

15 Q. And you said you wrote the chapter in
16 Harrison's. Actually -- and he held up two big
17 volumes. You didn't write those two big volumes,
18 did you?

19 **A. No. I think he made it clear I wrote**
20 **three chapters.**

21 Q. And on this subject -- on this subject,
22 it's -- you wrote it with someone else, correct?

23 **A. Yes.**

24 Q. And it's like seven pages, seven and a
25 half pages, correct?

1 **the others, apparently so.**

2 Q. I want you to assume that this jury has
3 heard about a blind reading by Dr. Petty, who had
4 not even -- didn't even know that it was an airline
5 attendant, but after being told, after he ventured
6 and gave his opinion, about there being emphysema,
7 he then said, "Well," and he then acknowledged that
8 "I could have guessed that it was an airline
9 attendant." So --

10 **A. I'm sorry. Do that again for me.**

11 Q. No, I'm not going to do it again.

12 **A. Wow.**

13 MR. REILLY: Objection, Your Honor.

14 MR. WEINSTEIN: I'll withdraw it.

15 THE COURT: Sustained.

16 BY MR. WEINSTEIN:

17 Q. I want you to assume that this jury has
18 heard the opinions of Dr. Petty, okay, who said --
19 who read the X-ray, the actual X-ray of Marie
20 Fontana and concluded there was emphysema. I want
21 you to assume that.

22 **A. All right. I'll assume that that is true.**

23 Q. Okay. Right. And the jury has heard that
24 testimony.

25 I want you -- and is it true that you

1 disagree with him also, assuming that's true?
 2 A. Yes, it is. I thought I made that clear.
 3 Yes, it is.
 4 Q. Can we agree that sometimes an illness or
 5 aggravation is caused or contributed to by various
 6 exposures?
 7 A. That's a very broad statement, and I would
 8 say yes.
 9 Q. In general?
 10 A. (Nodding head up and down.)
 11 MR. WEINSTEIN: Judge, may I have a
 12 moment?
 13 THE COURT: Yes, sir.
 14 MR. WEINSTEIN: Thank you.
 15 BY MR. WEINSTEIN:
 16 Q. I kind of lost my train of thought for a
 17 movement, please excuse me, but I was asking you
 18 about those reports. All that you were testifying
 19 to this jury is that when confronted with or when
 20 being shown X-ray reports, you were just saying --
 21 you said that the emphysema was not noted in their
 22 reports, correct?
 23 A. That is correct.
 24 Q. But you never spoke to any of those
 25 doctors as to whether or not, that is, those other

1 radiologist actually saved her life?
 2 A. She had a bronchial arterioect
 3 a radiologist. She certainly did.
 4 Q. That procedure is an extreme
 5 procedure to perform?
 6 A. It requires skill.
 7 Q. Right. And what doctor was
 8 by?
 9 A. I'm trying to think of the one
 10 Raton. I didn't commit all their
 11 Do you want me to look it up?
 12 MR. REILLY: Don't you know?
 13 MR. WEINSTEIN: When you go
 14 you'll realize why you have a seat
 15 MR. REILLY: He is your age.
 16 MR. WEINSTEIN: He is young
 17 MR. REILLY: Slightly. I'm younger
 18 you.
 19 THE COURT: We've had enough.
 20 MR. WEINSTEIN: You want us
 21 from that subject, right.
 22 THE COURT: Let's just get to
 23 question.
 24 BY MR. WEINSTEIN:
 25 Q. Did you see Dr. Kravitz' name

1 radiologists whose reports were projected in the
 2 medical records, you never spoke to any of them and
 3 said, "Well, did you also see emphysema but it was
 4 just -- you just didn't report it"?
 5 A. No, I didn't.
 6 Q. Now, have you -- and, of course, you've
 7 stated that you haven't spoken to any of these -- to
 8 any of the radiologists who treated Marie, correct?
 9 A. She wasn't treated by any radiologist,
 10 sir.
 11 Q. She wasn't treated by any radiologist?
 12 A. No.
 13 Q. Do you --
 14 A. She was treated by a pulmonologist, but
 15 not a radiologist. That would be radiation therapy.
 16 I don't think I saw that anywhere.
 17 Q. I thought you said you went through this
 18 medical record thoroughly?
 19 A. I did.
 20 Q. Didn't a radiologist perform a very
 21 sophisticated operation --
 22 A. Oh, you're talking about the --
 23 Q. -- let me finish.
 24 A. Okay.
 25 Q. -- because she was bleeding, and this

1 Dr. Kravitz, K-R-A-V-I-T-Z?
 2 A. Was he the one that did the
 3 arteriogram?
 4 Q. Yes, a youngish doctor, not her
 5 kind of stocky built?
 6 A. I didn't see that here.
 7 Q. I just wanted to demonstrate I
 8 exists.
 9 A. Okay. You've done that.
 10 Q. Yes. I just lost his name.
 11 And, obviously, you haven't
 12 about this doctor that we're talking about
 13 performed this sophisticated, difficult
 14 and operation and actually saved her
 15 what he saw on those -- on the X-ray
 16 A. No. I just read his report.
 17 Q. And, of course, if he's performed
 18 procedure also, he was concerned -- I
 19 concerned about that procedure not
 20 collateral matters that might -- that
 21 emphysema or anything like that?
 22 A. I'm --
 23 Q. I'll withdraw the question.
 24 Doctor, have you ever -- before
 25 hired by the tobacco companies, did

1 publicly any opinion about environmental smoke?
 2 A. When you say publicly express, tell me
 3 what you mean.
 4 Q. Did you write anything on it?
 5 A. I think I mentioned in the Harrison
 6 chapter that irritation -- irritation correlated
 7 with environmental tobacco smoke. If that
 8 qualifies, then the answer is yes.
 9 Q. And in that regard, without any data, as
 10 you said, without even any data, you have
 11 concluded -- that was my point -- that environmental
 12 smoke caused, at minimum, really at minimum,
 13 irritation?
 14 MR. REILLY: Objection, Your Honor.
 15 Repetitious.
 16 A. Yes. I think I've conceded that.
 17 THE COURT: Overruled.
 18 Any further questions?
 19 MR. WEINSTEIN: No, but I'd just like to
 20 thank the doctor. Thank you very much.
 21 THE COURT: Redirect?
 22 MR. REILLY: Yes, Your Honor. Briefly.
 23 REDIRECT EXAMINATION
 24 BY MR. REILLY:
 25 Q. Doctor, Mr. Weinstein started his cross

1 examination off by reciting a number of diseases and
 2 discussing whether or not mainstream smoke can cause
 3 them.
 4 Does Ms. Fontana have any of those
 5 diseases?
 6 A. No.
 7 Q. So let's talk about Ms. Fontana. Did you
 8 need to do a hands-on examination of Ms. Fontana in
 9 order to know what's wrong with her?
 10 A. I did not.
 11 Q. Was there something inadequate about what
 12 was contained in the medical records, after 12 or 13
 13 years of care and treatment by the people who were
 14 given the task of trying to help her, care for her,
 15 if possible save her life, was there something
 16 inadequate about those records?
 17 A. No. They were very good records.
 18 Q. Mr. Weinstein quoted, purportedly, from
 19 Dr. Foley. Assume for me that the plaintiff's
 20 radiologist came here and testified that no one
 21 knows what causes sarcoidosis and no one knows what
 22 causes it to progress, and no one knows what caused
 23 Ms. Fontana's sarcoidosis and no one knows what
 24 caused it to progress in her. Would you agree with
 25 all those statements?

1 A. Yes, I would.
 2 Q. Doctor, bringing a claim or bringing a
 3 lawsuit doesn't prove anything, does it?
 4 A. No, I don't think so.
 5 Q. It doesn't establish whether you do or do
 6 not have a disease, does it?
 7 A. No.
 8 Q. In this case, Ms. Fontana claims that she
 9 has either emphysema or chronic bronchitis or COPD.
 10 Does she have any of those?
 11 A. No, she does not.
 12 Q. One final question, Doctor.
 13 Let's see who you do agree with.
 14 MR. WEINSTEIN: Judge, excuse me. I'm
 15 sorry. Excuse me.
 16 I can see what he's doing. He's already
 17 testified about what he agrees with. So it's
 18 repetitious.
 19 THE COURT: Overruled. It's redirect.
 20 BY MR. REILLY:
 21 Q. Do you agree with the opinions expressed
 22 by the pulmonologists who cared for Ms. Fontana for
 23 at least 12 years?
 24 A. Yes, I do.
 25 Q. Do you agree with every one of these

1 radiologists, with the exception of Dr.--
 2 A. Well, the 12/23/96 we talked about, I
 3 don't --
 4 Q. With the exception of that one, do you
 5 agree with the interpretations made by every one of
 6 these radiologists?
 7 A. Except for H.F. Gardener, who appears
 8 twice, yes.
 9 MR. REILLY: No other questions, Doctor.
 10 THE COURT: Doctor, thank you very much.
 11 Mr. Reilly, who is your next witness?
 12 MR. REILLY: Your Honor, if I could just
 13 have one minute.
 14 Your Honor, I believe that will be our
 15 last witness. Could we have a short sidebar?
 16 THE COURT: I'm going to give the jury a
 17 break and then we won't need to have a sidebar.
 18 Ladies and gentlemen, we'll take about a
 19 15-minute break. I don't guarantee, but this
 20 may end your stay for the day and I'll have an
 21 update when you come back. So enjoy a good ten
 22 or 15 minutes.
 23 (The jury was exited the courtroom.)
 24 THE COURT: We'll take a five-minute break
 25 ourselves.

(A brief recess was taken.)

THE COURT: Now, what's the status on the rebuttal?

MR. HUNTER: I want to call Dr. Gardiner, because -- and Dr. Kravitz, and I've been forced to do this by virtue of the way this case has been defended. They were commenting on the doctors' reports and saying, "Since they don't put something there, it doesn't -- it means it wasn't there." And that's the way they tried their whole defense, and that's why I need to call doctors to testify as to what are on these actual films.

THE COURT: Anybody else proposed to --

MR. HUNTER: No. And we'd like to show that portion of Dr. Petty's Broin I testimony, where he gives his credentials.

MR. REILLY: We have three objections, Your Honor.

THE COURT: Okay.

MR. REILLY: The first one, let's deal with Dr. Petty. Dr. Petty's credentials have already been addressed. That was specifically permitted through Dr. Irvin. That would be cumulative.

plaintiff's claim.

His testimony, his opinions, were relied on heavily by every one or both of the plaintiff's experts. So how you can call him a rebuttal witness when all he would be brought in here to do is say, "That's what I found"? That isn't rebuttal.

And we never said -- we never put anybody on the stand and said it's not in his report, as Mr. Hunter just indicated. We simply said, we disagree with what's in his report.

So that's not rebuttal. There is no rebuttal case.

THE COURT: Well, what's the story with Dr. Kravitz on the witness list?

MR. HUNTER: Dr. Kravitz was not identified by us as a witness on the witness list.

THE COURT: Okay. He's out.

MR. HUNTER: Okay.

THE COURT: Petty's credentials have already been stipulated to.

MR. HUNTER: All right. Okay.

THE COURT: Now, Dr. Gardiner?

MR. HUNTER: Well, they testified as to

Dr. Kravitz, his name hasn't even come up.

THE COURT: It just came up.

MR. REILLY: This is the -- he's never been identified as a witness, number one.

Your pretrial order requires that all witnesses, both case in chief and rebuttal, be identified. He's never been identified.

Number two, Mr. Hunter's indication that the reason why he needs to call anybody is because there's been testimony about what's not in their reports. Dr. Kravitz' report has never even been referred to. He did an intervention that no one has even spoken about, except Mr. Weinstein right now with Dr. --

THE COURT: Well, that was in the plaintiff's case. That was spoken about.

MR. REILLY: Okay. Fine. I'll accept that.

If it was spoken about in the plaintiff's case, clearly we didn't talk about it, so you can't rebut something you brought up in your case in chief and we didn't talk about.

And, third, as far as Dr. Gardiner is concerned, he clearly is a guy who should have been brought in the case in chief. This is the

what Dr. Gardiner meant, especially as to air trapping. He read this film -- he read two films, and 12/23/96 CT scan, which really has been the focus of a lot of testimony that other people have testified as to what it shows, what he meant, but he also read the January 5 plain -- I'm sorry --

THE COURT: I can see it.

MR. HUNTER: I'm sorry. He also read this January 5th plain film, and it's critical that I be allowed to call him to be able to ask him whether or not what their witnesses said air trapping was, is what he meant when he said air trapping on his report, and they opened the door and I objected to them asking witnesses what the other -- what the opinion testimony in the record meant.

THE COURT: Okay. When is Dr. Gardiner available?

MR. HUNTER: Tomorrow morning.

THE COURT: You have him?

MR. HUNTER: Yes.

THE COURT: Okay. I'm going to allow Dr. Gardiner.

MR. REILLY: So I've made my record, Your

1 Honor --
2 THE COURT: Over your objection.
3 MR. REILLY: -- there's nothing about --
4 as a matter of fact, the first person who
5 indicated what Dr. Gardiner meant was their
6 witness, Dr. Foley. So they've already had
7 somebody testify as to what Dr. Gardiner meant
8 and what air trapping meant on
9 Dr. Gardiner's -- in other words, first of all,
10 Dr. Foley said, "This isn't opinion, this isn't
11 a differential diagnosis," so they've already
12 had testimony about that. That's on the
13 12-26-96 CT scan interpretation.
14 Then they had Dr. Foley testify that air
15 trapping, as referenced by Dr. Gardiner on the
16 1/5 and 1/6/97 report, meant the same thing as
17 severe COPD on the 12/23/96 CT scan
18 interpretation.
19 So they've already covered this. To bring
20 Dr. Gardiner in now -- first of all,
21 Dr. Gardiner could have been brought to testify
22 about that himself in the case in chief; and
23 secondly, Dr. Gardiner's testimony on the
24 subject is now cumulative. And on both those
25 bases, I'm going to object.

1 THE COURT: I'm going to allow Gardiner's
2 testimony.
3 How long do you anticipate Gardiner's
4 testimony to be?
5 MR. HUNTER: 15 minutes, 20 minutes.
6 MR. REILLY: I presume Dr. Gardiner would
7 not be permitted to testify about any other
8 CT's, any other X-rays, other than what he saw
9 and interpreted on that day?
10 MR. HUNTER: That's what I'm going to do.
11 It's two films that I told you I was going to
12 call him on, and that's what I'm going to call
13 him on.
14 THE COURT: Okay. So --
15 MR. REILLY: That doesn't waive my earlier
16 objection, though.
17 THE COURT: I understand.
18 MR. HUNTER: Judge, with regard to
19 Kravitz, I didn't list him on there by name, I
20 don't think so -- let me just -- did you look
21 to see if we did?
22 MR. MCCARRON: Yes. It's not on the
23 record.
24 MR. HUNTER: But I did list -- I did list
25 all people --

1 (Discussion off the record.)
2 MR. HUNTER: If I could have one second,
3 Your Honor.
4 THE COURT: Take your time.
5 MR. MCCARRON: Judge, one other thing that
6 counsel brought up, and they consistently did
7 it, and the reason "consistent" is part of the
8 key phrase, they would hold up these charts
9 with all their experts and on all of the cross
10 examination of our witnesses and say, "Does
11 anyone in these records say or is inconsistent
12 with what your opinion is?" In fact, they just
13 did it with Dr. Ingram. They held up this
14 chart.
15 Now, Ms. Fontana, and correct me if I'm
16 wrong, counsel, but was only at North Ridge
17 Medical Center for one and only one of --
18 MR. REILLY: Just so you don't make a
19 mistake, I didn't hold this up. I held this
20 up, simply to say, "Are these the medical
21 records that you looked at?"
22 The two charts that I held up to say, "Do
23 you agree with these people?" was this one, and
24 the one that has the three names of the
25 pulmonologists on it. So you're about to make

1 an argument that is factually inaccurate.
2 MR. MCCARRON: Well, he did hold this
3 up --
4 MR. HUNTER: You did hold that up.
5 MR. MCCARRON: -- this sign up many times
6 and say --
7 THE COURT: It was held up by the defense
8 on many occasions.
9 MR. MCCARRON: But on Number 16, North
10 Ridge Medical Center, Ms. Fontana was there
11 only one time, and that was for the
12 embolization by Dr. Kravitz.
13 So in -- what they had -- the defense had
14 done throughout this entire case over our
15 objection, Your Honor ruled and they kept doing
16 it time and time again, and actually, they went
17 farther than you allowed them to go in all your
18 rulings, and they kept saying whether or not
19 anybody in the medical records agree; and, in
20 fact, what they're doing with those type of
21 questions, inferring to this jury that they
22 basically have all these witnesses testifying,
23 without coming into the courtroom and
24 testifying, because they forgot to put
25 something -- not forgot, but they neglected to

1 put something in the record, and therefore, it
2 doesn't exist. That's why we are trying to
3 call Dr. Kravitz.

4 THE COURT: What would Dr. Kravitz testify
5 to?

6 MR. HUNTER: He would say there's
7 emphysema on the X-ray.

8 MR. REILLY: Your Honor --

9 MR. WEINSTEIN: Your Honor, this is the
10 real world, Judge. You get on -- they're
11 holding all these things up to their witnesses,
12 and they say, "Does anything in these records,
13 does anybody, any doctor in any of these
14 hospitals, anywhere, or any doctor, anywhere,
15 do you see where they have found that she has
16 emphysema or anything like that?" And they
17 say, "No, and that's consistent with what I
18 say." They all say that there's nothing except
19 for Dr. Gardiner.

20 We went through extraordinary efforts to
21 call these doctors. It's one of those things
22 that they don't want to get involved.

23 We went down the line. We noticed
24 Dr. Kravitz. We know he's at that -- we met
25 with him and we asked --

1 MR. HUNTER: I went to his home over the
2 weekend.

3 MR. WEINSTEIN: Went to his home over the
4 weekend and showed it to him. He is an
5 extraordinary -- first time we ever met him and
6 showed it to him. And this is real word,
7 Judge. This jury should not be deceived as to
8 what is really on those X-rays.

9 And he said -- and he's what they call a
10 super doctor, a young fellow, and he says,
11 "What, are they kidding? There it is. There's
12 that emphysema. It is not even a close
13 question."

14 So we said, "Are you available to
15 testify?" He said, "I never testified before.
16 I made it my point not to testify, but I
17 understand -- but I will in this case if
18 they're saying that it's not there. I can't
19 understand it. I have never testified for a
20 plaintiff or a defendant. I'd have to go
21 through extraordinary efforts to call my
22 partners. I'm holding down three separate
23 hospitals, and I have to be here and I have to
24 be there, and all that, but I understand that
25 it might be important for a jury to know the

1 truth one way or another."

2 I assure the Court, none of us said, "Do
3 you see this or that? What do you see?" And
4 he gave the opinion directly.

5 In fact, he even said -- he said, "You
6 mean" -- then when we said, "Well, the only" --
7 we mentioned that only one X-ray report says
8 COPD. Dr. Gardiner, and he said, "He's a highly
9 respected doctor. Everyone knows Dr. Gardiner
10 is a very fine doctor, but in my own opinion,
11 it's right there. You can't -- can't miss it.
12 And I don't understand that."

13 Nevertheless, Judge, so we're left with
14 this one doctor, this Dr. Gardiner, and he's
15 the one that they say, "I dispute," without
16 being able to call, and it's extraordinarily
17 important, an independent doctor who is -- who
18 did treat her, he actually treated her, who can
19 clearly point out what he can point out. And
20 this jury should not be under the false
21 impression that no other doctor in the world
22 except Dr. Gardiner and he's wrong and all
23 these other doctors is consistent.

24 It was wrong, Judge, from the beginning,
25 to tell these -- to have these witnesses say,

1 "Because COPD or emphysema is not in their
2 report, it doesn't exist." It's just wrong.

3 THE COURT: Did any of the radiologists
4 who testified refer to Kravitz' X-rays or CAT
5 scans or any -- what Kravitz did?

6 MR. REILLY: Your Honor, you need to
7 understand, Dr. Kravitz didn't do any of that.

8 MR. HUNTER: No.

9 MR. REILLY: Dr. Kravitz didn't take an
10 X-ray. He didn't interpret a CT scan.

11 THE COURT: Whose X-ray is he supposed to
12 be talking about?

13 MR. REILLY: That's a good question. He
14 did an embolization. He went into her artery,
15 and stopped the bleeding by occluding or doing
16 an embolization of an artery. He did not take
17 a CT scan. He did not take an X-ray.

18 THE COURT: Well, I have a strange feeling
19 he had to have some kind of diagnostic tool.

20 MR. REILLY: No. He's at a hospital where
21 they don't even do those things. She was sent
22 there just for the embolization.

23 THE COURT: A lot of these -- this type of
24 surgery, I don't know whether this involves it
25 or not, it utilizes basically X-rays and

1 optical --

2 MR. REILLY: Yes. He does basically an
3 arteriogram, a completely different procedure,
4 not involving X-ray, not involving CT scans.

5 They must have shown him CT scans and
6 X-rays from other institutions and asked him,
7 "What do you think about these?" They
8 basically developed an all new expert over the
9 weekend.

10 THE COURT: What X-rays is he referring
11 to?

12 MR. HUNTER: This is when she was bleeding
13 and they embolized her, and he's looking at
14 the -- he will probably be looking at the
15 Gardiner X-rays or the X-rays that were taken,
16 the A.P. film, in the North Ridge admission
17 when he did his thing with her.

18 MR. REILLY: Your Honor, they're
19 creating --

20 THE COURT: I'm going to rule on Kravitz.
21 He's not on the witness list, and basically I'd
22 have to agree with the defense on it. As far
23 as Gardiner, he's in.

24 Now, how much other work do we have to do
25 to get this thing to the jury by Wednesday for

1 final argument?

2 MR. HUNTER: I want to put in a document
3 on Mr. -- Dr. Koenigsberg. Remember he
4 testified he has a web page.

5 THE COURT: Yes. That's the advertisement
6 that cost him 30 percent.

7 MR. HUNTER: Right.

8 THE COURT: And he doesn't advertise?

9 MR. HUNTER: Right. I wanted to put in
10 his web page.

11 MR. REILLY: That's not what it is.

12 THE COURT: That's the same guy we're
13 talking about?

14 MR. REILLY: Same guy. No foundation for
15 the web page. Complete hearsay. There is no
16 evidentiary basis --

17 THE COURT: Let me see it.

18 MR. HUNTER: Here it is.

19 MR. REILLY: It's not on the exhibit list.
20 It's nowhere.

21 MR. HUNTER: He was the doctor who
22 volunteered that Mr. Weinstein's son had called
23 him and that Mr. Gerson had used him, and I
24 didn't know how to handle that when it happened
25 because it was totally improper for him to be

1 volunteering that.

2 But I think the jury should know -- and
3 there was a dispute between his recollection
4 and Mr. Weinstein's son as to who called who.
5 The testimony of Mr. Weinstein, who I didn't
6 intend to call, would be that this doctor
7 called him repeatedly to try to get him to hire
8 him, and he never did hire him. And one of the
9 reasons he didn't hire him is because his
10 reputation for truth and veracity was not good.

11 THE COURT: I don't think --

12 MR. REILLY: You know what, Your Honor --

13 THE COURT: -- you can put that portion
14 in.

15 MR. REILLY: -- I'm prepared to deal with
16 that, because I have the letter that
17 Mr. Weinstein's son sent to Dr. Koenigsberg.

18 Could you please put that up?

19 MR. WEINSTEIN: Of course, that was after
20 he --

21 MR. REILLY: Here is the letter that
22 Dr. Koenigsberg got from Mr. Weinstein's son:
23 "I believe that in the past you and I discussed
24 the unfortunate case of Mr. Rosenberg, the
25 Naples man who died when his chest busted open

1 a few weeks after open-heart surgery. You
2 might remember that he had his chest X-rayed
3 over 24 hours before and broken and malaligned
4 sutures were noted," et cetera.

5 "I had thought I had sent the X-rays to
6 you to review, but in my file I see no
7 indication that I did that. In that regard,
8 please give me a ring and let me know whether
9 you are interested in getting involved in this
10 Naples case. If so, I will do what I thought I
11 had already done, and get the X-rays and
12 appropriate records to you after we speak.

13 "I apologize for the confusion about this
14 matter, and look forward to speaking with you
15 shortly."

16 Could you go up to the top and give us the
17 date of this letter?

18 About a month ago, Your Honor.

19 Now, this inabsentia attack on
20 Dr. Koenigsberg, in which Mr. Hunter just
21 recited a set of facts which are clearly,
22 completely refuted by the letter
23 Mr. Weinstein's son sent to them --

24 MR. WEINSTEIN: You don't understand.

25 MR. HUNTER: You don't understand.

1 MR. REILLY: It doesn't matter what I
2 understand. The document speaks for itself.
3 MR. WEINSTEIN: No, it doesn't.
4 MR. REILLY: There is no evidentiary basis
5 for the document. It's never been on a witness
6 list, and there is no basis to put this
7 document -- if Mr. Hunter wanted to cross
8 examine him with it during the course of his
9 cross examination of Dr. Koenigsberg, he could
10 have done that, but he didn't do it.
11 MR. HUNTER: Well, I didn't know -- learn
12 about it until he told us on this witness stand
13 that he had a web page.
14 THE COURT: Now, how is -- the plaintiff,
15 Weinstein's letter, how is that not accurate?
16 MR. HUNTER: Okay. The doctor was
17 pestering, literally calling Mark Weinstein for
18 a long period of time, and he's -- Mark has the
19 messages where the doctor would continue to
20 leave messages for him, saying, "I want to work
21 on plaintiff's cases. I'll look at your case
22 for you." And then finally, after he'd been
23 called about hundred times, Mark was about to
24 use him, and he wrote this letter, but he
25 didn't retain him and he never sent him any

1 medical records.
2 MR. WEINSTEIN: He did discuss the case
3 with him as a result of being called a few
4 times, and then finally, he -- he never did
5 testify and he never sent him the records, even
6 though he says he will do it. When he checked
7 around and found out who he was, by the time he
8 was in my office, he didn't send him the
9 records. He never hired him or anything.
10 So this letter, it looks like -- well, it
11 even says so, it's February 21st, not too long
12 ago, Judge. It says, "I believe that in the
13 past, you and I discussed this unfortunate
14 case," but it has to do with a phone
15 conversation that they had when the doctor was
16 soliciting his business?
17 You know, I whispered -- I mentioned it to
18 you and that was the question he asked. He
19 said, "Isn't it true that you" --
20 THE COURT: How does the web page have
21 anything to do with this?
22 MR. HUNTER: Well, it doesn't. I mean, it
23 really doesn't, except for the fact that the
24 doctor was the one that threw this out. He was
25 the one that said, "We all had hired him." He

1 volunteered that. There was no question asked
2 of him about that.
3 And here, this web page shows that he
4 absolutely solicits business. "I am an
5 excellent expert witness and make an excellent
6 witness in court. I will travel, if needed. I
7 have -- I can review a case within 48 hours,
8 which includes a written report, if needed."
9 I mean, this guy is a professional
10 witness.
11 MR. REILLY: You know. Your Honor, the
12 fact of the matter is that on cross
13 examination, Mr. Hunter asked him if he didn't
14 have a web site, so Mr. Hunter knew he had a
15 web site when he cross examined this gentleman.
16 So, if he wanted to put this document into
17 evidence or attempt to put it into evidence,
18 that was the time to do it.
19 THE COURT: I don't --
20 MR. REILLY: You can't do it now. There's
21 no evidentiary basis to do it.
22 THE COURT: I have to agree. That's out.
23 Mark it so it's marked for identification
24 so we have it.
25 THE CLERK: 1-FF for identification for

1 the plaintiff.
2 (Thereupon, the referred-to document was
3 marked by the Clerk as Plaintiff's Exhibit 1-FF
4 for identification.)
5 THE COURT: And how much time are we going
6 to need to go over the instructions?
7 MR. HUNTER: I'd like to see, if you have
8 any more than you originally proposed?
9 MR. REILLY: You know what, I haven't been
10 in the instruction loop. I have to refer to
11 greater minds.
12 MR. HUNTER: I don't think it would be a
13 long time. Mine were right out of the book.
14 THE COURT: I've read all that have been
15 proposed. And if that's all we got, I can rule
16 in about five minutes, more or less.
17 MR. HUNTER: The verdict forms might take
18 some discussion, but I'm thinking maybe an hour
19 of time to be spent on it. It seems like we're
20 not going to have much to do tomorrow.
21 THE COURT: It seems that way to me, which
22 is a shame.
23 MR. GERAGHTY: I don't disagree too much
24 with Mr. Hunter. We have some instructions
25 that aren't standard that we'll need some

1 discussion about. He's right. The verdict
2 form, I think there is a lot of disagreement
3 regarding the form of the verdict.
4 How much time -- I didn't hear. How much?
5 MR. HUNTER: About an hour of time, I
6 would think.
7 THE COURT: Yes. Do you have any new
8 proposed instructions?
9 MR. GERAGHTY: I don't believe so. I
10 don't believe we have anything new that we
11 haven't already tendered to Your Honor.
12 THE COURT: How about the plaintiff?
13 MR. HUNTER: I might have two or three
14 additional.
15 THE COURT: We have Mr. Weinstein's --
16 MR. HUNTER: Yes.
17 THE COURT: His argument.
18 MR. WEINSTEIN: And that involves the two
19 statements that the Court takes judicial notice
20 of, that is, the number of people who have
21 pending claims and also that they would testify
22 except for the --
23 THE COURT: Cumulative.
24 MR. WEINSTEIN: -- cumulative nature, and
25 then an instruction on that. It's a short

1 instruction. I read it to you, but we didn't
2 give it to you; and that is, that they may
3 consider the judicial-notice statement in
4 determining whether or not a dangerous
5 condition did exist, et cetera. I have it
6 written out. I'll give it to the Court.
7 THE COURT: I would like to see it, if you
8 have it. I mean, I've got everything you've
9 given me up to date. I'm not sure you've given
10 me that.
11 MR. WEINSTEIN: I'll have it ready, Judge.
12 MR. GERAGHTY: One last thing. Mr. Engram
13 argued this towards the end of the plaintiff's
14 case, our request for judicial notice. You
15 granted it. Mr. Hunter didn't want us to read
16 our proposed instruction to the jury, during
17 his case in chief.
18 We prepared something short on the three
19 items we asked you to take judicial notice of,
20 and we would ask that you read that to the jury
21 before we rest our case, and I'll give copies
22 to the plaintiff's counsel.
23 THE COURT: This has already been
24 testified to.
25 MR. GERAGHTY: Well, this just gives a

1 recitation of those things to the jury. I
2 don't -- there's been some testimony -- I don't
3 believe all --
4 THE COURT: I don't think any of them have
5 been contradicted.
6 MR. GERAGHTY: That's right, because they
7 can't be.
8 THE COURT: It's already been testified
9 to.
10 MR. GERAGHTY: I'm not sure -- I'm not
11 sure that each of these three items are in the
12 record, Your Honor.
13 MR. HUNTER: Well, we object to this. I
14 think it's already been covered by testimony.
15 MR. GERAGHTY: Well, whether it's been
16 covered by testimony or not, Your Honor, we ask
17 that you take judicial notice of these three
18 items. You granted that request, and you said
19 you would read an instruction to the jury in
20 our case in chief, rather than the plaintiff's
21 case in chief, and we think this is a short,
22 plain statement of those facts.
23 THE COURT: There's no question about
24 that. I'm just not certain it was appropriate
25 if I said that, and I don't doubt that I said

1 it. I'm sure you could fish it out in a
2 heartbeat.
3 I'm not sure I agree with it any longer,
4 considering the testimony in this case. I
5 mean, this is uncontradicted testimony.
6 The only person who even remotely
7 contradicts it backed off when she testified,
8 and that was the plaintiff on cross
9 examination. She backed off. She thought that
10 Puerto Rico was excluded, and she had to admit
11 it wasn't.
12 So, let's mark this for identification,
13 but I'm not going to read anything special.
14 MR. GERAGHTY: Well, I mean, to the extent
15 relevant to our arguments -- I understand your
16 ruling, Your Honor. It's over our objection.
17 THE COURT: Right.
18 MR. GERAGHTY: Obviously we can argue any
19 of these points in closing.
20 THE COURT: Absolutely. Absolutely. I'm
21 not limiting you on that in any way, shape or
22 form.
23 MR. HUNTER: Your Honor, I'd like to
24 introduce into evidence the three cigarettes
25 that we used in our demonstration before the

1 jury, and I'd also ask that the seats be marked
2 as an exhibit so that the jury can use them, if
3 they desire, in their deliberations.

4 THE COURT: Any objection?

5 MR. REILLY: Sure. There is no foundation
6 for the cigarettes. They were used for
7 demonstrative purpose. Same with the seats.
8 Demonstrative exhibits, Your Honor, are not put
9 into evidence.

10 THE COURT: I'm going to allow it in.

11 MR. WEINSTEIN: I think I'd better get
12 these typed up, but I'll read it into the
13 record for Your Honor, and it's very short.

14 THE COURT: Why don't we do this? Go
15 ahead, since it's short.

16 MR. WEINSTEIN: "I instruct" -- after you
17 give the two other statements, "I instruct you
18 that you may consider evidence of other claims
19 for illness arising out of secondhand tobacco
20 smoke by other flight attendants who were
21 subjected to the same or similar conditions.
22 You may consider this evidence in determining
23 the actual smoking conditions that existed in
24 the airline cabins and also in determining the
25 dangerous character of secondhand tobacco smoke

1 to cause or aggravate or accelerate any
2 illness."

3 This is consistent with Rodriguez versus
4 Loxahatchee, that says when you take
5 judicial -- that is, when they consider other
6 claims, the judge gave them an instruction as
7 to how they can consider it.

8 Now, I'll have it typed. See, I just sort
9 of made a few --

10 THE COURT: This is your only copy of
11 this? See if you can get a copy made.

12 MR. WEINSTEIN: Yes.

13 THE CLERK: Judge, you're allowing the
14 cigarettes and the airline seats?

15 THE COURT: Yes. The seats.

16 THE CLERK: They're admitted?

17 THE COURT: They will be admitted.

18 THE CLERK: That will be Plaintiff's

19 Nos. 14 and 15, admitted in evidence.

20 THE COURT: Over defense objection.

21 (Thereupon, the referred-to documents were
22 marked by the Clerk as Plaintiff's Exhibit Nos.
23 14 & 15 in evidence.)

24 MR. REILLY: Your Honor, just for the
25 record, I don't know whose cigarettes these

1 are, and I don't know how they were selected.

2 THE CLERK: They're all the same.

3 MR. REILLY: They're all Marlboros. I
4 object, Your Honor. There is no testimony as
5 to these cigarettes in any way, shape or form.
6 There is no foundation to them.

7 THE COURT: You mean to tell me you think
8 any jury is going to believe an argument that
9 Marlboros weren't smoked on American flights?

10 MR. REILLY: Your Honor, in fact, there is
11 no evidence in this case, as you know, as to
12 what brands were smoked.

13 THE COURT: I want to hear that argument
14 made to this jury.

15 MR. REILLY: I'm not going to make the
16 argument.

17 THE COURT: I didn't think so.

18 MR. REILLY: There is no reason for me to
19 make the argument because it's not an issue in
20 this case. You've taken it out of the case.

21 THE COURT: Well, your objection is noted.

22 MR. CHUMBLEY: Judge, do you want to
23 entertain argument on Mr. Weinstein's request
24 for judicial notice?

25 THE COURT: That may take some more time.

1 Let me send this jury home. With your
2 permission --

3 MR. CHUMBLEY: We can do it tomorrow, if
4 you like, or this afternoon.

5 THE COURT: We might start -- I'll listen
6 to some this afternoon.

7 But with your permission, I'll just go
8 tell the jury in the jury room they're free to
9 go home, and we don't have to bring them in
10 here. Is that agreeable?

11 MR. HUNTER: Yes, Judge.

12 (A brief recess was taken.)

13 THE COURT: Mr. Chumbley.

14 MR. CHUMBLEY: I wanted to make sure
15 Mr. Weinstein is still here. I didn't know
16 whether he was copying that instruction or not.

17 MR. WEINSTEIN: The machine is warming up.

18 MR. CHUMBLEY: The machine is warming up.
19 Okay.

20 Judge, what I understand what they want
21 you to take judicial notice of, they want you
22 to take judicial notice of the fact that 3,000,
23 plus or minus, other complaints have been filed
24 in Dade County Circuit Court by other flight
25 attendants against these same defendants.

One of the things that the rule requires, and I'm reading from 90.203 of the Florida Evidence Code, requires that the person who requests the court to take judicial notice must furnish the court with sufficient information to enable it to take judicial notice of the matter.

They have presented you at the outset with nothing other than what Mr. Weinstein has stated.

THE COURT: Well, I can take judicial notice of the fact that I am the recipient of 1/16 of the 3,000-plus cases. This is just the first.

MR. CHUMBLEY: Well, I'm not sure you can even do that, Your Honor. The cases construing -- because I don't know whether you have exactly 1/16 of the cases. I don't know.

THE COURT: I have whatever the percentage of the General Jurisdiction.

MR. CHUMBLEY: But it might not be a straight percentage. But the cases under the judicial notice statutes, which is 90.202 and 90.203, requires that if you're going to take judicial notice of matters in other court

records, there's cases out there suggesting that they have got to bring you certified copies of those other matters from other cases, or at least bring you copies of the complaints that they want you to take judicial notice in, so that it becomes part of this court record.

They have done neither, Your Honor. So, procedurally, their request for judicial notice is defective by the failure of them to bring in to you sufficient information to allow you to take judicial notice; and that is, either the cases which suggest certified copies of the complaints that they want you to take judicial notice, or at least copies of them, so you can take a look at it and determine for yourself if this is something that is capable of being judicially noticed.

Your Honor, there are also cases out there that say that other court records are the things that judicial notice is not to be encouraged. And the reason is, is that it establishes or it brings in collateral issues that take the jury's attention away from what should be their main focus.

And I cite the Court to the City of Coral

Gables v Brasher, 132 So.2d 442, the Third District, in 1961, said, "The practice of introducing original court files of other cases into evidence for a case on trial is one to be discouraged."

The Adobe Brick case, Manila Plastering, Inc., v. Adobe Brick and Supply Company, Inc., 273 So.2d Page 1, Florida Supreme Court, 1973. "The trial court is not authorized to take judicial notice of the records in a different case pending or disposed of in the same court but outside the record in the case before the trial court."

And I finally cite the Court to National Union Fire Insurance Company of Pittsburgh v. Underwood, 502 So.2d 1325, Fourth DCA case, 1987, where the court says, "We know that judicial notice should be exercised with great caution because not every fact is subject to proof by judicial notice, only those with common and general knowledge."

THE COURT: How does all this play into the fact that this is a spin-off of a class action?

MR. CHUMBLEY: I don't think it does, Your

Honor, because the -- this is not a spin-off of a class action. The class action is over.

The only thing that -- the only --

THE COURT: Wait. I'm sorry.

MR. CHUMBLEY: It's over. There's been a final order of dismissal in a class action case. What we're working with now is a settlement agreement that allows flight attendants to bring and prove otherwise time-barred claims for injuries allegedly arising out of exposure to environmental tobacco smoke aboard aircraft.

THE COURT: And how many of the 60,000 possible class members actually filed?

MR. CHUMBLEY: I don't know the exact number. It is in excess of 3,000.

THE COURT: 3,000, right.

MR. CHUMBLEY: I don't know the exact number. I don't think Weinstein does either.

MR. WEINSTEIN: It's five percent. 3,200, approximately.

MR. CHUMBLEY: Approximately.

MR. WEINSTEIN: And, Judge --

THE COURT: Hold on, Mr. Weinstein. I'm going to give you free reign. I'm going to cut

1 you off right now. I'm going to give you free
2 reign.

3 Go ahead.

4 MR. CHUMBLEY: Your Honor, I believe that
5 asking you to take judicial notice of 3,000
6 other complaints in this courthouse is
7 procedurally defective. They haven't brought
8 them in for you to see. And, also, the case
9 law indicates it's not to be encouraged; in
10 fact, it is to be discouraged.

11 More importantly, even if it is something
12 you could take judicial notice of, and even
13 assuming they had complied with the procedural
14 requirements of the rule by bringing in the
15 complaints to you, either certified copies or
16 at least copies, the 3,000 cases simply are not
17 relevant.

18 Mr. Weinstein spent a lot of time with
19 Your Honor, arguing that similar accidents,
20 either prior or subsequent similar accidents,
21 are admissible into evidence. I submit to Your
22 Honor that the argument made by Mr. Weinstein
23 is simplistic and, in a certain way,
24 misleading.

25 One of the things that the cases are

1 completely consistent on, even the cases cited
2 by Mr. Weinstein, are that before you can even
3 consider whether or not these other claims are
4 admissible, you have to establish that there is
5 substantial similarity between what's in those
6 cases and what's in this case.

7 Again, he hasn't brought you the
8 complaints, so it's hard for you to tell,
9 without bringing you the complaints, as to
10 whether there's substantial similarities.

11 Examples of some of the things that should
12 be shown before you can make a finding that
13 these are substantially similar. These flight
14 attendants have different diseases. I don't
15 believe there's another one of these 3,000
16 flight attendants that has sarcoid, Your Honor.

17 There is no similarity on exposures.

18 The length of exposure. We have some
19 flight attendants, Your Honor, that never even
20 flew on a smoking flight. We have some flight
21 attendants who have filed claims that began
22 flying as flight attendants after 1988, when
23 the two-hour ban went into effect.

24 We have completely different routes.

25 There's no similarity. There's no showing of

1 similarity in terms of routes. We have some
2 flight attendants that flew international only;
3 we have some flight attendants that never flew
4 international.

5 THE COURT: What did Judge Baskin say
6 about that in the Broin case, when discussing
7 about the -- because my understanding is Judge
8 Kaye originally did not designate this as a
9 class action and Baskin --

10 MR. CHUMBLEY: That's correct.

11 THE COURT: -- reversed that saying there
12 was substantial similarity.

13 MR. CHUMBLEY: Well, Your Honor,
14 substantial similarity, for purposes of whether
15 or not a class should be certified, I
16 respectfully submit is a different standard
17 when we're talking about whether there's
18 substantial similarity for admission of
19 evidence. That is a whole different ball game.

20 THE COURT: We have, on the one hand, a
21 general scientific consensus that tobacco
22 causes innumerable diseases by -- per your last
23 witness, Dr. Ingram. And we have a whole bunch
24 of --

25 MR. CHUMBLEY: I'm sorry, Your Honor.

1 Causes what?

2 THE COURT: He said that it causes --
3 tobacco smoking causes a substantial number of
4 diseases.

5 MR. CHUMBLEY: Direct smoke.

6 THE COURT: Well, tobacco smoking. I'm
7 just going to use those words at this time.
8 Lip cancer, lung cancer, you name it. Heart
9 diseases. A whole litany of diseases.

10 And he also says -- he says, although the
11 Surgeon General disagrees with him, that
12 there's not yet enough data to make an opinion
13 one way or the other that ETS has not been
14 proven to cause emphysema, COPD, chronic
15 bronchitis or any of the other cancers.

16 So he's neutral on that, but the Surgeon
17 General says that tobacco causes, in its
18 environmental tobacco smoking form, causes all
19 kinds of diseases, and their testimony is
20 that -- Dr. Burns, et cetera, was that it is
21 scientifically accepted in 199 -- what was the
22 testimony? '7.

23 MR. CHUMBLEY: I heard what you said, Your
24 Honor. I'm not quite sure how that relates to
25 whether or not evidence of other lawsuits is

1 admissible in this case.
2 We know -- unless Your Honor has read the
3 complaints in your division, we know nothing about
4 those people. Nothing.

5 THE COURT: Let's just assume that if
6 there were 60,000 potential class members and
7 3,000-plus have filed some form of complaint,
8 we don't know whether it's as good, worse or
9 better than Ms. Fontana's. That's pretty
10 much -- even if 5 percent of those numbers turn
11 out to be good, that's pretty close to an
12 epidemic.

13 MR. CHUMBLEY: Judge, it --

14 THE COURT: And so if half of them turn
15 out to be valid cases, that is an epidemic.

16 MR. CHUMBLEY: But, Judge, none of those
17 cases have been determined to be valid. I
18 agree, there's an epidemic; there is an
19 epidemic of lawsuits that's being filed.
20 That's the only epidemic that the 3,000
21 lawsuits on file is indicative of.

22 Now, not one of those flight attendants
23 have had their cases tried --

24 THE COURT: No, because this is the first
25 one.

1 MR. CHUMBLEY: -- to this court or any
2 other one.

3 THE COURT: This is the first one, and
4 it's only being tried because of the special
5 conditions of this case.

6 MR. CHUMBLEY: That's right, Your Honor,
7 but what we're talking about right now has
8 nothing to do with what Judge Baskin said on
9 class certification, has nothing to do with the
10 fact that we're trying this case because
11 Ms. Fontana is in serious medical condition,
12 which no one in this courtroom has disagreed
13 with.

14 THE COURT: Right.

15 MR. CHUMBLEY: But what we are talking
16 about right now is what evidence gets admitted
17 to this jury for them to consider that, is
18 nothing more or less than Your Honor deals with
19 on an everyday basis, on every slip and fall,
20 every rear-ender, every product liability case
21 that Your Honor tries. It has nothing to do
22 with a class action. It has nothing to do with
23 the settlement agreement. It's a pure evidence
24 question.

25 The fact of the matter is, Mr. Weinstein

1 has not given you anything upon which to hang
2 your hat that there is substantial similarity
3 between any of those other cases and this one.

4 If you read some of the complaints that
5 have been filed by Mr. Hunter and others in
6 these cases, they allege everything from soup
7 to nuts, endometriosis, infertility, all are
8 alleged, and they all vary in terms of working
9 for different airlines. Some started in 1948.
10 Some started in, like Ms. Fontana, in the '70s.
11 Some didn't even start until the '90s.

12 Some people, unless they flew
13 international, you know, were flying when there
14 wasn't even any smoking allowed on domestic
15 flights at all.

16 So we're talking about different
17 exposures. We're talking about different
18 lengths of exposure. We're talking about
19 different conditions, none of which -- it's
20 Mr. Weinstein's --

21 THE COURT: Maybe I'm misunderstanding
22 you, but are you telling me that you have
23 flight attendants who were not flying until
24 after the total ban on tobacco smoke took place
25 in 1994, or whenever it took place?

1 MR. CHUMBLEY: Well, I said domestic. I
2 believe that there are some flight attendants
3 that began their careers as flight attendants
4 after 1990, yes, sir.

5 THE COURT: When the two-hour limit --

6 MR. CHUMBLEY: No. That's the six-hour
7 limit on domestic. That's the one that dealt
8 with Puerto Rico.

9 THE COURT: Okay.

10 MR. CHUMBLEY: The six-hour flight. There
11 are -- I can remember from having read it,
12 because I raised my eyebrows when I read it,
13 too, that didn't start working as flight
14 attendants until 1990. So, that person's
15 exposure is clearly different, and clearly not
16 substantially similar to what Ms. Fontana had.

17 This is a basic finding that Your Honor
18 has to make, that each and every one of these
19 3,000 other complaints are substantially
20 similar, not the fact that they claim the same
21 product hurt them; that's not enough for
22 substantial similarity. Not that they sued the
23 same four defendants in every case; that's not
24 substantial similarity.

25 You have to go behind what's in their

1 barebones complaint and say: "All right, is it
2 substantially similar? Are these people in the
3 same -- substantially the same condition as
4 Ms. Fontana and as this jury has been told
5 Ms. Fontana was?"

6 And the fact of the matter is, you've got
7 nothing to make that determination on, because
8 Mr. Weinstein has not brought you anything, no
9 showing of substantial similarity. The inquiry
10 stops on the admissibility of prior or
11 subsequent, similar accidents.

12 Unless Your Honor makes that finding, you
13 have to deny the admission of that evidence.

14 More importantly, Your Honor, the cases
15 cited by Mr. Weinstein say that the admission
16 of prior and subsequent accidents is also
17 relevant to causation, or dangerous condition,
18 I think is what he referred to it as.

19 Once again, the settlement agreement and
20 Judge Kaye's order of October 5, 2000, which
21 we're trying this case under, the issue of
22 liability is not in dispute. The cases that
23 Mr. Weinstein has cited to you say that the
24 prior and subsequent accidents are relevant to
25 the defendant's knowledge of a dangerous

1 condition; not that a dangerous condition
2 exists, the knowledge of a dangerous condition.

3 And the case that he cited Your Honor
4 about the jury instruction that he said
5 supported your giving a jury instruction on
6 this issue, which I believe was the case of
7 Rodriguez versus Loxahatchee -- look at the
8 jury instruction that was given in the
9 Loxahatchee case: "Evidence of other accidents
10 may not be considered as proof of negligence,
11 but it may be considered as proof of a
12 defendant's knowledge of a dangerous condition
13 when the evidence demonstrates that the other
14 accidents occurred under substantially similar
15 circumstances."

16 So, that says a lot. That says two
17 things: You've got to have substantially
18 similar circumstances, which I've just told you
19 they haven't shown, and, secondly, it's only
20 relevant as to the defendant's knowledge of a
21 dangerous condition.

22 THE COURT: Aren't you --

23 MR. CHUMBLEY: None of the cases --

24 THE COURT: Are you admitting that you
25 know your product is dangerous?

1 MR. CHUMBLEY: No. The issue of our
2 knowledge of whether it's dangerous or not is
3 not an issue for this jury under Judge Kaye's
4 order. That is a liability issue.

5 Because knowledge of a dangerous condition
6 creates a duty under which, if breached, could
7 be considered to be negligent, it's a liability
8 issue. It's not a causation issue.

9 Our knowledge of whether or not ETS is or
10 isn't dangerous is a liability issue. It goes
11 to negligence. It goes to defect. It doesn't
12 go to causation, Your Honor.

13 And the fact of the matter is that
14 Mr. Weinstein's -- all of Mr. Weinstein's cases
15 talk in terms of the defendant's knowledge of
16 the dangerous condition.

17 Mr. Weinstein, in his argument, indicated
18 that's relevant to -- for the existence of a
19 dangerous condition, and that is just not the
20 case.

21 The instruction that he says -- he bases
22 his opinion on clearly states the law,
23 knowledge of a dangerous condition; defendant's
24 knowledge of a dangerous condition only when
25 the evidence demonstrates that the other

1 accidents occurred under substantially similar
2 circumstances.

3 No similar circumstances have been shown
4 here, number one. And, number two, our
5 knowledge of a dangerous condition is not
6 relevant to this case, as it's being tried
7 under Judge Kaye's October 5, 2000 order, which
8 takes liability out of picture.

9 There are numerous cases, Your Honor --
10 I'll wrap up here, quickly.

11 Even assuming that they followed the
12 procedure of 403, even assuming that this is
13 something that the Court should take judicial
14 notice of, which we disagree with, even
15 assuming that they've shown substantial --
16 similar circumstances, which they haven't, and
17 even assuming that defendant's knowledge of a
18 similar condition is relevant in this case
19 under Judge Kaye's order, which it is not, we
20 would submit, Your Honor, that the evidence
21 should still be excluded under rule 403, in
22 that the prejudice outweighs any marginal
23 relevance this may have.

24 As I indicated in my earlier argument, the
25 courts look at this evidence very carefully.

1 because they consider it to be collateral and
2 to divert the jury's attention away from the
3 matter directly in controversy and leads to
4 conclusion by the jury. And I cite the case of
5 Carnival Cruise Lines v Rodriguez, 505 So.2d
6 550, a Third DCA opinion from 1987 where
7 evidence of other accidents -- incidents or
8 accidents tends to inject collateral issues and
9 tends to divert the jury's attention directly
10 from the matter directly in controversy.

11 As you might imagine, in that case, Your
12 Honor, it was a cruise ship, and the trial
13 court admitted a portion of the ship's medical
14 log which contained crew member complaints as
15 evidence of symptoms consistent with
16 toxoplasmosis, which the plaintiff contends he
17 contracted from the food served on board the
18 cruise lines. Defendants asserted the log
19 should not have been admitted because it bore
20 no relevance to the issue of causation.

21 The Third DCA held that the trial court
22 erred in admitting those portions of the ship's
23 medical log which referenced other complaints
24 consistent with toxoplasmosis.

25 But the Third DCA also said that this was

1 I can supply Your Honor with copies of the
2 cases if you want.

3 THE COURT: Okay. I'll be glad to look at
4 them. Absolutely.

5 MR. CHUMBLEY: I'll sit down and bring
6 them up to you.

7 MR. HUNTER: If I can make one point
8 before Mr. Weinstein gets going.

9 I think that the analysis has been made
10 judicially, as a result of the class action,
11 that these people are similarly situated. But
12 I would also ask the Court to remember the
13 testimony that was received in this case by
14 flight attendant after flight attendant, how
15 substantially similar those conditions are,
16 that the planes essentially, regardless of
17 which airline you're on or which type of plane
18 you're on or what the ventilation is, that the
19 conditions, as all testified to by the
20 witnesses, can be smokey and it was impossible
21 for them to get away from it and they had to
22 deal with it and be irritated by it.

23 THE COURT: Their only substantially
24 similarity argument, as I understand a
25 substantial similar circumstance argument, goes

1 collateral stuff; you've got to look at this
2 stuff very carefully, because it tends to
3 divert the jury and it's collateral.

4 I also cite the Court to the case of Auto
5 Specialty Manufacturing Company versus
6 Boutwell, 335 So.2d 291, a First DCA opinion
7 from 1976. In this case, evidence of prior
8 accidents with hydraulic jacks exploding was
9 inadmissible, absent showing the circumstances
10 surrounding the prior accidents, which they
11 haven't done.

12 Moreover, the First DCA noted: "The
13 evidence raised collateral issues which would
14 confuse the jury."

15 We're talking about collateral issues that
16 confuse the jury. They haven't established the
17 foundation to admit any of this into evidence.
18 But even if Your Honor thinks that they have
19 and that Your Honor thinks that these 3,000
20 other complaints are relevant, we would submit
21 that they should be excluded under Rule 403,
22 because their admission would tend to divert
23 the jury and confuse the jury and, thus, the
24 potential for the confusion outweighs marginal
25 relevance that the evidence may have.

1 to what disease is allegedly either caused or
2 aggravated by the environmental tobacco smoke.

3 MR. CHUMBLEY: Well, it does go beyond
4 that. It also goes to the fact that there's
5 been no showing of substantial similarity in
6 terms of their exposure, their duration of
7 exposure. We have some flight attendants that
8 have been working that -- I believe Bland Lane,
9 I believe who started in 1948, her exposure and
10 length of exposure is drastically different
11 than even Ms. Fontana's, and then we have some
12 people who testified they didn't start until
13 1990.

14 THE COURT: Some people can walk through a
15 mine field and not set off a bomb, and some
16 people can't help but set off a bomb no matter
17 what happens.

18 Go ahead.

19 MR. WEINSTEIN: Thank you, Judge.

20 It seems to me that I've heard this song
21 before, because that's exactly it. What Mr.
22 Chumbley, with all due respect, argued is
23 exactly what they argued in the Third District.
24 Exactly.

25 They said: "They're all different."

1 They're all exposed at different times. One
2 flew in the '40s, another one in the '50s.
3 another one in the '70s."

4 The Third District didn't buy it then and
5 this Court should not now.

6 Judge, you know, with all due respect --
7 you notice I said due respect to Mr. Chumbley,
8 because I am -- I am a bit taken aback at what
9 I consider to be, most respectfully, a
10 disingenuous argument, and I'll tell you why,
11 Judge, and I will have to start from the
12 beginning, as Al Hucksley (phonetic) says.

13 He says, "I have to call to this Court's
14 attention first, to go back to the beginning,
15 matters that may be judicially noticed." And
16 he says, "Judge, they've got to bring certified
17 copies."

18 Well, all of the cases that are cited,
19 what, five, six, seven cases, talk about claims
20 where they didn't even file any lawsuits. They
21 said it would be for argument.

22 THE COURT: For argument's sake, let's
23 just see what we can do. Number one, I would
24 like to see a representative sample of the
25 cases that Mr. Hunter has filed. And I'd also

1 like to see how many cases, in fact, have been
2 filed, and you should be able to get that from
3 Harvey Rubin.

4 MR. WEINSTEIN: Yes.

5 THE COURT: You should be able to get that
6 real quick. All you have to do is contact the
7 clerk's office and get that information,
8 because I would like to have it done and have
9 it available tomorrow, and I'd also like to see
10 what I would call a representative, say -- how
11 many cases do you have, Mr. Hunter?

12 MR. HUNTER: 400.

13 THE COURT: I would like to see a
14 representative sample of that, say, ten or 15
15 of those cases, 20 of those cases.

16 MR. WEINSTEIN: Judge, I believe that a
17 computer was used for all the complaints, other
18 than --

19 THE COURT: I wouldn't be surprised. I'd
20 be shocked if it wasn't, because there's got to
21 be a great deal of similarity in all of the
22 complaints.

23 MR. WEINSTEIN: Almost every paragraph is
24 the same except for, as I recall it, the --

25 THE COURT: We're over that issue now.

1 What's the next one?

2 MR. WEINSTEIN: Judge, I want you to know
3 that it says for judicial notice alone, it says
4 you may take as judicial notice facts that are
5 not subject to dispute because they are
6 generally known within the territory, and then
7 it says, "Facts not subject to dispute because
8 they are capable of accurate and ready
9 determination by resort to sources whose
10 accuracy cannot be questioned," and that's
11 really what you just asked us. I'll get it
12 downstairs.

13 The interesting part, though, Judge, is
14 they should not be heard to argue this. I'll
15 tell you why, because -- unless they're
16 misrepresenting to the Court, they say that
17 they want to prevent us from calling anymore
18 witnesses because they say there are 3,000
19 cases pending and it would all be cumulative if
20 we -- cumulative, meaning they'll give the same
21 testimony about the conditions and the smoke,
22 et cetera. And what is -- so, therefore, it
23 should not even be an issue.

24 And Mr. Chumbley should not have even
25 raised it, because their own pleading, unless

1 they're misrepresenting to the Court, states
2 that this case is one of approximately 3,000
3 cases filed under the Broin class action
4 seeking compensatory damages caused by
5 occupational exposure to environmental tobacco
6 smoke as flight attendants in airline cases.
7 Period. We agree.

8 I will stipulate there are 3,000 cases
9 pending arising out of tobacco smoke.

10 Now, what is upsetting about this -- about
11 statements made by Mr. Chumbley, at least to
12 me, Mr. Chumbley, when he tells you about the
13 Rodriguez versus Loxahatchee case, he read to
14 you only the first part of the instruction. Do
15 you remember? He said that it's admissible
16 evidence -- proof of the other accidents is
17 admissible and may be considered as proof of
18 the defendants's knowledge of a dangerous
19 condition. That's only one-third of it.

20 You may remember, Judge, I said to you
21 from day one, there are two basic reasons why
22 other accidents, prior and subsequent
23 accidents, are admissible. One is to prove the
24 existence of a dangerous condition. In the
25 conjunctive -- and also, to prove knowledge, if

1 that's an issue.

2 Let me read to you the entire instruction
3 that is under consideration.

4 Here's the instruction the court gave,
5 Judge. It's exactly what I said and exactly
6 what it is.

7 "Evidence of the first part" -- he
8 stopped. "Evidence of other accidents may not
9 be considered as proof of negligence, but they
10 may be considered as proof of the
11 defendant's" --

12 THE COURT: Slow down. The court reporter
13 is never going to get that.

14 MR. WEINSTEIN: Yes.

15 -- "but may be considered as proof of the
16 defendant's knowledge of a dangerous condition,
17 only when the evidence demonstrates that the
18 other accidents occurred under substantially
19 similar circumstances, conditions and causes to
20 the accident in dispute." That goes to
21 causation.

22 Then it says this, Judge, and he
23 conveniently omitted this: "Such accidents
24 must have occurred under conditions and
25 circumstances at a place substantially similar

1 is well settled in Florida that sufficiently
2 similar other accidents, not too remote in
3 time, is relevant to show the existence of a
4 dangerous condition, and knowledge."

5 Now, Judge, that's a 19 -- that's the 1994
6 case, and what was involved there, Judge, in
7 that case was two other car accidents into a
8 canal. Just two other accidents. We've got
9 3,000 of them. Two other accidents.

10 And then, Judge, in those other cases that
11 I had previously mentioned, indeed, Judge, you
12 don't -- in Warn Industries -- I have all Third
13 District cases -- Warn Industries versus Geist,
14 Third District, 1977, that's 343 So.2d 44,
15 Judge, in that case, they admitted one -- one
16 complaint to show that a -- the dangerous
17 character of a product.

18 A question was asked on interrogatory,
19 Judge, of a prior accident, and says if -- an
20 interrogatory was sent to the defendant: "If
21 you have, within the last five years, received
22 any complaint of injury or occurrence similar
23 to those alleged -- allegedly experienced by
24 the plaintiff, please state."

25 They came back and they said, "There's one

1 to the accident in dispute."

2 I'm going very slow now, Judge: "The
3 evidence of similar accidents must have a
4 tendency to establish a dangerous or defective
5 condition at the place in question and must not
6 be too remote in time to the accident or
7 condition in question."

8 Now, this is the total -- this is the
9 charge that the Judge gave to the jury. In
10 other words, evidence of a similar accident
11 must have a tendency to establish a dangerous
12 or defective condition.

13 Then it says in the case: "It is well
14 settled in Florida that sufficiently similar
15 other accident evidence, not too remote in
16 time, is relevant and admissible to show the
17 existence of a dangerous condition." That's
18 why it's relevant.

19 And then it goes on and it says: "And
20 knowledge."

21 So, as I argued before and as I presented
22 to the Court before, it's for two reasons.

23 In fact, in this case, they first say --
24 they don't even say knowledge first. What they
25 say is that -- this is the Court speaking: "It

1 complaint," and they say, on December 18th of
2 1971. The Court held it's admissible.

3 One complaint, Judge. They said it's
4 admissible.

5 Third District -- what I like about that
6 case, Judge, it's 1977, and they say as far
7 back as 1977.

8 "However, it has usually been held that
9 only substantial similarity of conditions is
10 required, and there's perhaps evidence, a
11 trend, probably part of a general trend toward
12 the more liberal admission of evidence toward
13 treating the condition of sufficiency of
14 similarity of conditions as primarily a matter
15 for the trial court's discretion and to freely
16 admit the evidence of prior accidents, together
17 with evidence of variations in the conditions,
18 which is treated as going to weight, rather
19 than admissibility."

20 In other words, Judge, they're saying 25
21 years, somebody was there 25 years, 30 years,
22 different airlines. They say, "Hey, that goes
23 to weight." They should bring that out, and
24 there's a trend toward liberally allowing that
25 evidence in.

1 And in that case, as I said, Judge, that's
2 one complaint. And they allowed it in.

3 I'm going to give you the package. I'll
4 give it all in one.

5 And, of course, I mentioned the Hobart
6 case, which is the meat grinder. That had
7 three other claims.

8 What is shocking here is that he's arguing
9 to you -- Mr. Chumbley is saying, "Well, it
10 hasn't been determined whether you're
11 responsible. This is the first one." In other
12 words, I guess what he's arguing is you might
13 be able to show other injuries if that case
14 went to trial and the jury found in favor of
15 the plaintiff. No such case law ever exists.
16 This is simply complaints. You can put in
17 evidence of complaints where people didn't even
18 file the lawsuit.

19 That's the case I just mentioned, the Warn
20 case, Warn Industries.

21 In Hobart, it's just complaints. But you
22 may remember, I told you about the Hobart case,
23 they said, when the three people raised their
24 hands and said they had a similar complaint and
25 they didn't have a hand, they said it might

1 have been better -- "We agree it would have
2 been preferable for the appellees to proffer
3 the complaints filed in the lawsuit." I guess
4 it doesn't show that's the reason, because they
5 felt it was kind of prejudicial for somebody to
6 put up a hand with no hand.

7 In the Lazar case, two accidents. Also,
8 incidentally, two witnesses, plus two filed
9 complaints. Also a meat grinder case. All
10 under different meat grinders and whatever.

11 In Saunders -- did I give the cite? 436
12 So.2d 236, also Third District, 1983.

13 In Saunders versus Florida Keys Electric,
14 three accidents, power lines, different
15 locations. Admitted.

16 THE COURT: I know what you're talking
17 about. The boatyard cases.

18 MR. WEINSTEIN: Humn?

19 THE COURT: Those are the boatyard cases.
20 Those you have already cited to me.

21 MR. WEINSTEIN: And to show the existence
22 of a danger. Loftin and Railway -- I'm going
23 to give all those to you.

24 THE COURT: I think you have.

25 MR. WEINSTEIN: I'll sit down.

1 THE COURT: And we'll discuss it further
2 tomorrow.

3 MR. REILLY: Your Honor, can I make a
4 short reply?

5 THE COURT: Sure.

6 MR. REILLY: Your Honor, Mr. Chumbley
7 mentioned this a while ago, and I think it has
8 to be re-emphasized, and I offer up to Your
9 Honor the A.H. Robins case, which is a 1985
10 Third DCA case, that specifically addresses
11 whether or not you can admit evidence for the
12 purpose of establishing causation, not for the
13 purpose of establishing fault or liability.
14 That's all that they were offering the evidence
15 for in the A.H. Robins case, for the purpose of
16 establishing causation, not fault.

17 This is not a case in which the issue of
18 notice is applicable. Because of Judge Kaye's
19 order, that issue has already been taken out of
20 the case.

21 So, what is at issue is exactly what was
22 at issue in the A.H. Robins case, whether or
23 not you could put in evidence claims of other
24 folks saying that they got infections using the
25 Dalkon Shield. And the Third DCA plainly said

1 you can't do that. They said that's
2 inadmissible.

3 So, first of all, we have a clear
4 indication from the governing body of this
5 court that, for the purpose that they want to
6 put it in in this case, they can't do it.

7 On the issue of similarity, their claim
8 here is two-fold. One is that there is a
9 certain disease process going on in
10 Ms. Fontana, that clearly there's an enormous
11 dispute whether or not she even has it; and the
12 other is, whether or not she has an aggravation
13 of her sarcoidosis.

14 Your Honor, this is the one and only
15 sarcoidosis case that's been filed by the
16 plaintiffs. The one and only. So there are no
17 other cases that are substantially similar to
18 this case in that regard, no one.

19 And you've heard repeatedly from the
20 witness stand over and over and over again,
21 from plaintiff's witnesses and from our expert
22 witnesses, that no one knows what causes
23 sarcoidosis, and no one knows what causes it to
24 progress, no one knows what caused it in her,
25 no one knows what caused it to progress in her.

1 That's exactly what the only medical
2 doctor that they brought said about her
3 sarcoidosis.

4 So, I honestly don't know how anyone can
5 stand here and say there are substantially
6 similar circumstances contained in the filings
7 of 3,000 lawsuits. Those 3,000 lawsuits, I
8 think we have some numbers that would indicate
9 to Your Honor that of them, about 2,800 involve
10 allegations of either sinusitis or bronchitis,
11 not emphysema, not COPD. There are probably
12 1,100 of them that claim only sinusitis.

13 And, you know, that although there is an
14 allegation in this case of sinusitis, there is
15 no evidence of sinusitis and no medical doctor
16 who came here and diagnosed sinusitis in this
17 lady. Is there a substantially similar
18 circumstance in this case with 1,100 cases of
19 alleged sinusitis?

20 There are roughly 150 breast cancer cases
21 alleged. This lady doesn't have breast cancer
22 and isn't alleging it.

23 There are about 50 lung cancer cases,
24 alleged. Whether they actually have lung
25 cancer or not, we don't know. They've had a

1 couple of hundred cases dismissed already,
2 voluntarily dismissed.

3 There's a case called Marisa Mitchell that
4 was scheduled to go to trial in February, then
5 March, in which Ms. Mitchell claims that she
6 has sinusitis. It turns out that she sued the
7 doctor, who operated on her nose for sinusitis,
8 claiming he committed malpractice because she
9 never did have sinusitis.

10 MR. HUNTER: She never sued him.

11 MR. REILLY: Well, you know what? She
12 absolutely sued him. She filed a lawsuit in
13 Tennessee and sued him for his malpractice.

14 Now, she dismissed the lawsuit because the
15 claims guy -- she filed the lawsuit at the same
16 time she entered a class membership in this
17 case, and the claims fellow for the doctors'
18 medical malpractice carrier called up her
19 lawyer and said, do you know that she's
20 claiming in this class action that she has
21 sinusitis, and in your lawsuit against my
22 doctor, my insured, you're saying that she
23 never had sinusitis and shouldn't have to
24 suffer the surgery?

25 Now, are these cases -- are these claims

1 so established that someone should take
2 judicial notice of them? Clearly not.

3 Do they involve the same disease that
4 Ms. Fontana has, sarcoidosis? Clearly not.

5 Does the Third DCA -- do we have in this
6 case an issue of fault for which notice is
7 relevant? Clearly not.

8 So what's the reason these fellows want to
9 put this number in front of this jury? Why do
10 they want to do that? They want to do that
11 because they want to do exactly what the Third
12 DCA in the Allstate case says you can't do --
13 I'm sorry -- the Dalkon Shield case says you
14 can't do; and that is, that you can't put it in
15 for the purpose of establishing that it caused
16 the disease.

17 That's exactly what they tried to do in
18 Dalkon Shield, and that's exactly what the
19 Third DCA said you can't do.

20 Now, they already got this in, over our
21 objection, in that series of hypotheticals that
22 were presented by Mr. Weinstein to Dr. Ingram;
23 this whole deal about if you're in an airplane
24 cabin and if you -- wouldn't this be a
25 wonderful study. I objected to every one of

1 those, even though I hate to object during
2 cross examination, but it's already in, over
3 our objection.

4 And there's no reason now to give them a
5 second bite, in conflict with the Third DCA
6 ruling in the A.H. Robins case, telling this
7 jury that simply because they filed a whole
8 bunch of lawsuits, the validity of which, if
9 this is any example, are seriously in doubt,
10 why should they get to bootstrap the mere fact
11 that they paid filing fees in over 3,000 cases,
12 to convince this jury that a disease process
13 that's terribly in dispute in this case is
14 actually caused or aggravated by exposure to
15 environmental tobacco smoke.

16 I don't know why that should happen.

17 THE COURT: Okay. Well, we're going to
18 take it up tomorrow.

19 MR. CHUMBLEY: Chum --

20 THE COURT: The jury is coming back at
21 10:00.

22 MR. CHUMBLEY: Judge, just so the record
23 is clear, I'm handing the Court Carson versus
24 Gibson, City of Coral Gables versus Brasher,
25 National Union Fire versus Underwood, Carnival

1 Cruise Lines versus Rodriguez, and Auto
2 Specialties versus Boutwell, B-O-U-T-W-E-L-L.
3 (Court was adjourned at 5:00 p.m.)
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